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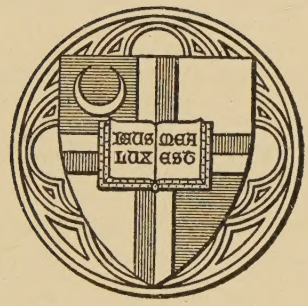

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THE BLESSED CONTARDO FERRINI

Allocution by His Holiness Pope Pius XII *

IT is with particular pleasure that We welcome you, distinguished professors and beloved sons, who have gathered in this eternal City, the mother of Law. You have come to venerate the new Blessed, Contardo Ferrini, the lustre of the Italian universities, the mirror of Christian life, who appeared to shine among us as a radiant model of knowledge and virtue in the halls of learning. Very fitting indeed has been the effort of Our beloved and worthy University of the Sacred Heart in Milan in promoting the cause of this Beatification. For Learning and Faith distinguished our Contardo—that learning which is no obstacle to Faith, but which he made into a rung to climb on it nearer to God and to the faith of his fathers; embracing in his life as in a synthesis both human and religious knowledge, to rise finally to another,

* On April 14, 1947, the day following the solemn Beatification of the Blessed Contardo Ferrini (1859-1902), the Holy Father received in the great Aula of Benedictions, together with a number of Italian bishops led by Ildefonso Card. Schuster, Archbishop of Milan, the Rector and Faculty of the Catholic University of the Sacred Heart in Milan; delegates of other universities and cities; of the Catholic Action and various cultural, students' and social organizations. The Italian original of the following eulogy which Pius XII on this occasion delivered, as is his wont, without the aid of a manuscript, appeared in the *Osservatore Romano* of April 16, 1947 (vol. LXXXVII, No. 88). The editors of *Seminar* take pleasure in acknowledging the advice of Rev. Anselm Strittmatter, O.S.B., and Miss Alba Zizzamia in preparing the English translation.

supreme knowledge: the knowledge of the Love of Christ: *scire etiam supereminentem scientiae caritatem Christi* (Eph. 3:19).

Human knowledge, religious knowledge, knowledge of the Love of Christ: these are the degrees of the genius, the virtues, and the holiness of Contardo. But holiness, too, has a teacher, the divine Master who said to His Apostles: *magister vester unus est Christus* (Mt. 23:10). Indeed it was in the school of Christ that Contardo learned to know the worth of the world and of the soul, and that he laid the foundations of that interior spiritual edifice which he was to erect in the years of his short but strenuous life.

He had grasped the fact that man is an *ens finitum quod tendit ad infinitum* (Contardo Ferrini, *Un po' d'Infinito*): that he has an immortal soul which bridges the gulf that divides the material from the spiritual world; and which, upon leaving the body, flies to rest on the shores of Eternity, in the sight and the judgment of God. All through his earthly pilgrimage he had his eyes and his thought fixed on this ultimate goal, nourishing himself on his way with the food of learning and of human, historical, and legal science—but the vital and substantial food of his spirit were the piety and the virtues drawn from divine revelation, that he might become one with Christ in the fire of his love.

Cor sapientis quaerit doctrinam: "The heart of the wise seeketh instruction" (Prov. 15:14). This word of Scripture shines like the North star over the life and the work of young Ferrini, the law student. After finishing with excellent success his secondary studies, he devoted himself with persevering zeal to learning properly so called. At an age when others frequently set out with

abandoning themselves to the carefree gaiety of student life and the excesses of academic freedom, and thus all but too often waste their most beautiful years and their best strength, Ferrini at once with a rare fervor took to his studies.

Very soon he showed a marked talent for scholarly research, and this in a field which to any one not knowing its reward may appear dry, remote from this world, and, as it were, unfit for the young; a field which promises but scant external advantage to the student who has to think of a quick career in practical life: We mean the field of research in the sources and the history of Roman law. But Ferrini brought with him a rich endowment for his task: that is, not only a profound knowledge of the classical, and a good command of the more important modern languages, but also a pure and lofty idealism which revealed and showed to him in Roman law a reflexion of that Natural law which even pagan thought had regarded as something eternal and divine, as Cicero solemnly testifies: *Hanc igitur video sapientissimorum fuisse sententiam, legem neque hominum ingeniis excogitatam nec scitum aliquod esse populorum, sed aeternum quiddam, quod universum mundum regeret imperandi prohibendique sapientia* (Cic. *de legibus* 2.4).

A brilliant doctorate at the University of Pavia—the glorious mother of so many jurists—with a dissertation on the benefit which the history of criminal law can derive from the poems of Homer and Hesiod, was the first reward of his labors. With this thesis the young doctor won also a scholarship entitling him to study at a foreign university. His inclination and his interest in the field of his preference made him choose the University of Berlin.

With a heart full of hopes, but also with some trepidation, Ferrini crossed the Alps in the fall of 1880 and went to Germany, to the then resplendent capital of the Hohenzollern Empire, which after its victory of ten years before had risen to world power; to Berlin which was also the center of German Protestantism and of the struggle which the Chancellor von Bismarck had waged against the Church.

Who will tell what temptations this young man, full of love as he was for the faith of his fathers, and resolved as he was to guard the lily of his purity, had to face in the whirlpool of a modern and predominantly non-Catholic city? We know for sure, however, that at the end of his studies he returned to his country strengthened and steadied in the integrity of his manly virtue, enlightened and fortified in the firmness of his faith. He had been able to observe with his own eyes the spiritual dearth of those who, outside the true Church of Christ, must live without the support of the Sacraments; who are deprived of the divine comfort of the Holy Eucharist: " in their emptiness far away from the banquet of Paradise " (Letter to Vittorio Mapelli, 8 May 1881).

But at the same time he had seen at close range, with all the enthusiasm of his youthful soul, how in the tempest of the *Kulturkampf* a Catholic minority had been able, with an indomitable certitude of victory, to put up a heroic and efficient resistance; to defend fearlessly the Kingdom of Christ and His Vicar on earth; to stand closely united in brotherly harmony; and to consolidate, unabashed before all the forces of the enemy, their own ranks into a vigorous organisation. His heart went in particular to the great Catholic works of charity and social action, in which he could take part as an active member of the Conference of St. Vincent de Paul. Still, his

main concern in Berlin were his post-graduate studies under the direction of those illustrious masters who at that time led the field in historical research, and particularly in legal-historical research.

It is well known to this distinguished and learned audience that towards the end of the eighteenth century the science of Roman law had come to turn for orientation to the concepts of the school of Natural law—only to fall quickly into the philosophy of the Enlightenment. No doubt a sound doctrine of Natural law, as taught in the Church by the exponents of the *philosophia perennis*, and as developed to perfection in the works of a St. Thomas Aquinas, of a Suarez, could have had a profitable influence also on studies of Roman law. But unfortunately the school had become more and more divorced from the lofty truths of Christian thought and turned to the untenable principles of the Encyclopedists and philosophers of the Enlightenment. Little wonder, then, that it produced no truly lasting, profitable result. In this way, after a short and promising impetus, the movement spent itself in sterile controversies and unsound legal dogmatism.

The reaction soon became manifest. As early as the beginning of the nineteenth century a strong yearning for new methods and new forms showed itself among the academic youth. The younger educated generation renounced the cold and barren cult of Reason proclaimed by the Enlightenment philosophy, and under the kindling impulse of a new patriotic enthusiasm betook itself with ardor to the investigation of the national history, especially of the medieval civilization which, with its poetry, its religious thought, its characteristic forms of life and law, filled equally with joy and satisfaction both mind and heart. Thus the age of Romanticism was born, and

with it a new sense of history and historical research in every field.

It was then that there began in Germany the brilliant studies of the Grimm brothers on ancient German language and literature and on the legal antiquities of the Germanic peoples. It was then that the great enterprise of the *Monumenta Germaniae historica* was founded, with its design to bring together all the documents of German history, including the collections of the laws of the various Germanic tribes—an enterprise which incidentally rendered valuable services also to the knowledge of the history of the Church and the Popes in the Middle Ages.

These signal accomplishments and advances in the field of the sources of Germanic law gave a mighty impulse to the students of Roman law, all the more so because ever since the famous " Reception " of 1495 the latter had formed the basis of the actual private law in Germany. And it was of the greatest importance that at the head of the new movement there stood a man of great renown and learning, who—even as Niebuhr in the studies of ancient history—was an authority in Roman law, and who provided the new historical method with a philosophy of its own (not an altogether faultless one, to be sure): Friedrich Karl von Savigny, who is considered the founder of the " historical school " in modern legal science.

On this background a rich and manifold activity developed among the Romanists in Germany. It may be summed up in the following main groups, of which We will have to say a few words in brief, in order to understand and to place, as it were, into its proper context the scientific contributions of the new Blessed Contardo.

The first group regards the preparation of critical editions of the sources of Roman law. After Niebuhr in

1816 had discovered and published the Institutes of Gaius, a whole series of critical editions appeared. This came about in particular by the merits (to cite only a few) of Theodor Mommsen, Paul Krüger, Otto Lenel, Emil Seckel, Wilhelm Studemund. Ferrini entered especially into close personal relations with Alfred Pernice and Karl Eduard Zachariä von Lingenthal, the pioneer explorers and writers in the field of Roman-Byzantine legal sources, who received the young Italian student with fatherly affection, cherished him, and helped him to penetrate thoroughly this vast and difficult subject.

The second group is that of the general treatises and monographs on legal history. The outstanding champion in this field is Savigny with his masterly work, *Geschichte des römischen Rechts im Mittelalter,* followed by numerous other scholars of highest skill, such as Mommsen himself, Pauly, Voigt, Karlowa, Krüger, Conrat, Wissowa. There was also, contributing to the broadening of research as well as of the inquiry into points of detail, the long series of periodicals, the most famous of which remains the *Zeitschrift für geschichtliche Rechtswissenschaft,* founded in 1815 by Savigny himself and continued by the new *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* with its three sections of Roman, Germanic, and Canon law.

Finally, on the basis of this rich historical material, the great commentaries of Roman law were written: the *System des heutigen römischen Rechts* by Savigny, the commentaries of Glück, Bethmann-Hollweg, Puchta, Windscheid, Dernburg; the classic works of Mommsen, *Römisches Staatsrecht* and *Römisches Strafrecht.* The last-mentioned treatise appeared almost at the same time as the work of the same title by our Ferrini, *Diritto penale romano*—a book which in the opinion of compe-

tent judges and of Mommsen himself, though of a different approach, was of no less value than that of the great master of Roman Antiquity.

This was, sketched in a few rapid strokes, the scholarly world in the midst of which our Blessed Contardo found himself. Full of enthusiasm and devoted to study, gifted with a keen mind and an iron will, he was not only able to absorb and render fruitful the powerful impulses for work he received from the intellectual life of Germany, but also to advance and to grow, quickly and steadily, to the maturity of a perfect scholar and teacher. On the other hand, his firm religious conviction and his clear-sighted mind saved him from those opinions and exaggerations which ever since the beginnings of the historical school had tended to dominate its followers.

For some time Italian Romanists of great renown, such as Alibrandi, Serafini, Scialoja, had been deeply deploring the fact that the study of Roman law had lost in the very homeland of all higher legal science its splendor and power, and that the first place in this field had fallen to other countries. In his strong young soul Ferrini nurtured the ardent wish to work untiringly till the day when the daughter residing in foreign lands could be brought back with dignity and honor to her glorious mother. By the time he returned to Italy, in 1882, he had readied his tools for so grandiose a task. If today in the science of Roman law his country is marching once more at the head of the nations, this is due, as much as to other distinguished masters, to our Blessed Contardo.

Even as he had striven, following the exhortation of Scripture, for knowledge, so he also fulfilled that other word of Holy Writ: *Vir sapiens plebem suam erudit, et fructus sensus illius fideles sunt* (Eccli. 37:26): " A wise

man instructeth his own people, and the fruits of his understanding are faithful."

Plebem suam erudit: He became the teacher of the youth of his people. To them he imparted in the Universities of Pavia, Messina, Modena, and then again of his beloved Pavia, the copious fruits of his lofty mind, of his careful researches, of his generous heart. His reserved and distinguished manners; the Christian nobleness of a saintly life; his clear and penetrating way of presentation; the constant example of an untiring and unchangeably upright scholar, gained him respect and admiration everywhere.

Et fructus sensus illius fideles: Rich indeed was the harvest which our Blessed Contardo produced and reaped as fruit of his study and toil. In little less than twenty years, over two-hundred scientific publications came forth from his pen, among them works of high and lasting importance. All of them—also the minor ones—bear the imprint of his clear mind, his all-embracing culture, his indefatigable industry. There you will find, besides his articles on unpublished manuscripts and special problems of civil law, ample dissertations on the sources and the history of Roman law; commentaries on the Digest and the Roman penal law; and above all those critical editions of the sources of Roman-Byzantine law which made Ferrini's name celebrated in the world of scholars: from the so-called *Paraphrasis* of Theophilus, through the Digest and his contributions towards a restoration of the *Basilica,* down to the Syro-Roman Law Book and the *Tipoukeitos*—the latter in collaboration with Giovanni Mercati, who is today the honor and lustre of the Sacred College of Cardinals.

It is known, to be sure, that he wrote rapidly and almost in haste (a haste from which at times the exactness

of his citations suffers): but nonetheless the fruits of his labors, as prepared and gathered by him in persevering and faithful toil, remained themselves faithful to their author: a perennial monument of his truly solid scholarship, an imperishable contribution to the history of that law which will always shine among the indestructible titles to glory of his people and his country. *Sunt iusti atque sapientes, et opera eorum in manu Dei* (Eccl. 9:1): "There are just men and wise men, and their works are in the hand of God."

In Contardo Ferrini, as with all truly great men, the professional work and the inner life were joined in an inseparable unity: therefore the profile of the scholar becomes visible in its fullness only in the light of the Saint. His conscientiousness in his calling was illuminated and guided in its deepest roots by a spotless faith and by a forceful determination to be a servant of Truth in all its manifestations; seeking God in everything and ordaining everything towards the Creator and Lord in compliance with His most holy and divine will.

There might have been learned men who surpassed Ferrini in their brilliancy of mind; others might have been more favored by luck in their discoveries. But in the perfection and noble purity of what makes the genuine prototype of a student and scholar, he must certainly be counted among the best: never restless, never violent, reposing in the firm and steady harmony of all his spiritual resources—the result of a life of virtue and prayer. In him all was transparent clarity, secure calmness, serene joyfulness of the spirit, sincere devotion to, and unchanging love of truth. Sober and reserved as he was in his outward appearance, his work radiated the inner, restrained flame of a man who has dedicated his life to the quest for truth and who behind the noble countenance

of all earthly science is always seeking the eternal Truth of God.

This love of truth, the genuine mark of distinction of the learned, of the scholar, was the incentive and dominant impulse of his work: he was pledged to truth as to a great lady with all the affection and devotion of a faithful servant. Therefore in his studies he readily went back, time and again, to the original sources, examining and scrutinizing them with erudite care, in order that the historical facts might speak to him with the greatest possible elimination of error.

With this trait, Ferrini combined a sound, We might say an objective humility. For he considered himself in front of the holiness of truth, not a conceited know-all, but just a modest student, although with his unique knowledge of the sources and the literature, with his accuracy and reliability in research, with his keen and quick intelligence, he had become a past master in his field. His innermost disposition is reflected and manifest still today, as in a mirror, in his style, which is manly, clear, limpid, calm and objective, simple and straightforward, but enlivened by the compelling and irresistible power of a fervent seeker of truth and an indefatigable worker.

An indefatigable worker indeed was our Blessed Contardo. He knew no regard for his frail body, no pause nor rest. Nor did it ever happen that he became weary or discouraged by the toil of minute research in difficult manuscripts: on the contrary, it was there and then that he imposed upon himself the most rigid discipline. Is it astonishing that from him a great moral power emanated to all who were around him? It was the power of those who are pure of heart; who know themselves carried, supported, and moved by the Spirit of God; it was

the power they receive from the Divine Redeemer in the Holy Eucharist.

Contardo Ferrini was—and this is the essential quality of his mind—really a Saint. A saint not after the image the world so frequently fancies: a stranger to the life on earth, unfit, unexperienced, timid, awkward. Not so: Ferrini was a saint of his times, of the century of frenzied activity; the century during which the mind and the hand of man have reached out to conquer by technology and science the active energies of the entire physical universe.

Our age likes to call itself the age of real facts. It sees fit to forsake piety and the depth of religious feeling which, it is said, should be put away as unreal, unfounded, a superfluous frill of life. Some cannot understand how a man could live in the world of today, work efficiently and successfully for human society, and at the same time be a saint. Others think that the inner life and prayer are as " mystical facts " in obvious contradiction with the hard struggle for existence and with the chafing labor of modern man, which does not admit of mysteries, nor faith, nor fear of a life beyond. Could there possibly exist for the cold and scrutinizing reason of a man of learning, for the mind of a technician who conquers and masters the laws of nature—could there possibly exist a supranatural world and the mysteries of revelation? This question is asked by not a few.

Here our Blessed Contardo comes forward and answers with a clear and resolute *Yes*. Loudly and firmly he speaks this *Yes*, which is his firm profession of faith in the supranatural life, in revelation, in the Holy Church—even as, on the other hand, he has confidence in the efforts of science to achieve an ever-increasing knowledge of

truth. He is the man of modern reality, but also the saint of the present hour: the mystic of the union with God, in Whom he was immersed, and at the same time, so to speak, the mystic of fact and action—of that assiduous industry which is not construed, through a misconception of the divine order, as an end in itself, nor enhanced to a kind of substitute for religion; but which rather receives its stimulus and power, its dignity and efficiency, from the Creator and Lord of all truth, and which knows but one supreme end: the glory of God and the true welfare of mankind.

God and the welfare of mankind! For Ferrini the Law, with its history and development, was not an isolated object of scientific research which finds its satisfaction in itself, but rather the application of the eternal, of the divine moral law to the reality of human life, as one of the strong pillars which are grounded in God Himself and contribute to the building of society, to the universal good of the nations.

How could it have been otherwise for our Blessed Contardo? He could not conceive that legislation, the history, and the development of law should be treated like those frescoes and mosaics that are torn from the altars which once they adorned for the edification of the faithful, only to lose their beauty, their light, their very meaning among the profane canvasses in a museum. Similarly, law and legislation divorced from God are as dead things; like a dry limb torn from the living and life-giving tree; like a barren field that brings forth no fruit. What fruit, what gain for the true happiness of a people could there be in a legislation which is not based on the faith in God; which pretends to ignore faith as something inconsequential and superfluous, or is ashamed even to

pronounce the Holy Name of the Lord? Far from God, all social bodies and legal orders sooner or later will end in despotism and tyranny. *Vestigia terrent.* " Behold," the Psalmist cries out, " they that go far from Thee shall perish " (Ps. 72:27). " But happy is that people whose God is the Lord " (Ps. 143:15)!

At a time when the world, separated from God, seems to have become almost impervious to any divine influence; at a time when some systems of philosophy deliberately try to construct on sand a morality and a law without God, it is a great consolation to Us that the Lord has given to the Church a saint who was a Master, a Giant in the field of law, and at the same time a man of God, a model worthy of admiration for the supranatural elevation of his spirit and the holiness of his life.

Bow your heads, then, distinguished professors and beloved sons, before the image of Contardo Ferrini who has been raised to the honors of the altar. In his lifetime, he worked neither wonders nor portents. The portent and the miracle is he himself, a radiant model of every virtue for the veneration of the people. Bow your heads in meditation. Meditate on the way in which he made himself a saint, in a century when the charity of Christ seems to be banished from human society; in a century when the teaching of Christ and his Gospel are often despised and voided in the practice of life and of the family; in a century when the knowledge of nature and of the world, to be sure, have increased—but also that knowledge which exploits Nature and the bowels of the Earth for forging and accumulating weapons and inventions for war, destruction, and slaughter.

Meditate on how, with all the progress which accompanies the course of human life, man's permanent abode

is not here, because he is created for another world, a spiritual world to which all men are destined, but of which the many think so little. The Saints are the heroes who have their feet on the Earth and their mind in Heaven. Contardo Ferrini was one of them, ever since his boyhood. Learn from him and from his example how to grow in the science which from the Earth raises us aloft to Heaven and to God, and transforms our steps in this life down here into a sum of merits for the life beyond, which knows of no end. Let not profane learning fill you with pride. May the knowledge of truths of Faith, deeply studied and practiced, guide you on high. May the knowledge of the charity of Christ exalt you in Him.

THE ORIGIN OF THE DUAL MODE IN ROMAN PROCEDURE

Viro clarissimo Iulio Christiano van Oven
antecessori iuris romani in Universitate
Lugduno-Batava

amicitiae pignus

THE distinctive feature of the Roman procedure by which it stands apart from nearly all other forms of procedure is its separation in two phases: *in iure* and *apud iudicem*. Between these two phases there were fundamental differences. They not only took place before different persons, at different times and in different localities, but their general character was radically different. The procedure *in iure* was controlled by the magistrate, in the older form of procedure, *per legis actiones*, as well as in the younger form with a written *formula* (*per concepta verba*). Its purpose was to lead to the formal declaration of the controversial issue by the litigants in order to put it in that form before the *iudex privatus*, a *civis romanus*, to be settled. In the second phase, *apud iudicem*, the points at issue were debated before the chosen *iudex* and sentence was given.

The main difference as to the general characteristics of the two phases of the Roman process is the extreme formalism *in iure* and the absolute freedom of the *iudex* in the investigation and the examination of the facts. As illustrations of the former, the well-known examples mentioned by Gai. 4.11 and his remarks in 4.30 and Vat. frg. 318 instantly occur to memory. The *iudex*, on the other hand, is not bound by any formal rule of evidence; he is free even in his appreciation of an oath and a confession (Africanus, D. 42.2.7) and the sentence is pronouced without any formality. It is not so easy to give a satisfactory explanation of the historical evolution which led to this dual mode. The modern view of Roman procedure, due to the great Austrian jurist Moriz Wlassak, has moved the men on this chessboard too, but it did not succeed in establishing a generally accepted opinion.

The theory of Leopold Wenger, who disagrees with Wlassak on this point, did not meet with approval, and Jolowicz has pointed out its weak parts. The latter's interesting study [1] has been my starting-point for submitting to my learned friends and colleagues in the field an hypothesis concerning the origins of the dual mode in Roman procedure which seems to me to clear away most of the existing difficulties.

I

The possibility first to be considered is that the dual mode took its origin with the beginning of the Roman Republic and did not exist in the regal period. This is the point of view of the ancient tradition.

> Pomponius, D.1.2.2.1: Et quidem initio civitatis nostrae populus sine lege certa, sine iure certo primum agere instituit omniaque manu a regibus gubernabantur.
>
> Cicero, *De Rep.* 5.2.3: Nihil esse tam regale quam explanationem aequitatis, in qua iuris erat interpretatio quod ius privati petere solebant a regibus. Nec vero quisquam privatus erat disceptator aut arbiter litis sed omnia conficiebantur iudiciis regiis.

Dionysius of Halicarnassus confirms the idea of the Roman kings exercising full power of justice. In Book IV, 25, he narrates of King Servius Tullius that he proved to be a friend of the people because, while the former kings settled themselves all disputes, both public and private, he made a separation between these two and established judges to whom he gave laws as rules to guide them:

> *τῶν γὰρ πρὸ αὐτοῦ βασιλέων ἁπάσας ἀξιούντων ἐφ' ἑαυτοὺς ἄγειν τὰς δίκας καὶ πάντα τὰ ἐγκλήματα τά τε ἴδια καὶ τὰ κοινὰ πρὸς τὸν ἑαυτῶν τρόπον δικαζόντων, ἐκεῖνος διελὼν ἀπὸ τῶν ἰδιωτικῶν τὰ δημόσια, τῶν μὲν εἰς τὸ κοινὸν φερόντων ἀδικημάτων αὐτὸς ἐποιεῖτο τὰς διαγνώσεις, τῶν δὲ ἰδιωτικῶν ἰδιώτας ἔταξεν εἶναι δικαστάς, ὅρους καὶ κανόνας αὐτοῖς τάξας, οὓς αὐτὸς ἔγραψε νόμους.*

[1] H. F. Jolowicz, "Procedure in iure and apud iudicem," *Atti del Congresso internazionale di diritto romano,* Bologna II (1935) p. 57 ff.

In Book IV, 36, he lets Servius Tullius say to the senators that he leaves to them the private issues to judge: *ὃ τῶν ἔμπροσθεν οὐδεὶς ἐποίησε βασιλέων.*

The older school was not unwilling to follow suit and still in the most recent edition of Girard's *Manuel* we find the question treated in this manner,[2] but nowadays the majority of scholars is inclined to consider these ancient reports unreliable and untrustworthy. In the first century before Christ, the Romans did not dispose of reliable information concerning the constitutional law of their regal period[3] and the view of the authors cited is probably based on constructive thinking rather than on historical evidence available to them. Cicero himself gives us a hint where he could have found his idea of *iudicia regia* when he regards Numa, the founder of the law and of the cult of the gods, as an imitator of the Greek kings and when he fathers upon him the same tasks which formed the essence of *βασιλεία* in the heroic age, according to Aristotle, *Pol.* III.10 (1.1285 b): *στρατηγός τε γὰρ ἦν καὶ δικαστὴς ὁ βασιλεὺς καὶ τῶν πρὸς τοὺς θεοὺς κύριος*—whereas previously it is said of the kings:[4] *τὰς δίκας ἔκρινον.* Mommsen's doubt as to the historical truth of this presentation of the facts is shared by most of the later writers, who are inclined to attribute to the then current ideas about Greek constitutional evolution the anachronistic misconceptions of Dionysius by which he ascribed the dual mode in Roman procedure to the good democratic King Servius Tullius.[5]

[2] P. F. Girard, *Manuel* (1929) p. 24, p. 1032 note 5; *Organisation judiciaire des Romains* (1901) p. 77-82, cf. p. 22 note 1; Ed. Cuq, *Manuel* (1928) p. 805; G. May, *Eléments de droit romain* p. 599; G. Cornil, *Ancient Droit romain* (1930) p. 122; Mommsen, *Röm. Staatsrecht* II, 229; Bethmann-Hollweg, *Röm. Civilprozess* I, 54f.; Paul Jörs, *Römische Rechtswissenschaft* (1888) p. 48; Wlassak, *Prozessgesetze* II, 333.

[3] Rosenberg, article "Rex" in Pauly-Wissowa, *R. E.*

[4] M. Wlassak, *Zum röm. Provinzialprozess* (1919) p. 12, note 3.

[5] Mommsen, *Röm. Strafrecht* (1899) p. 5: "wahrscheinlich der letzten republikanischen Epoche angehörige Legende" and in note 1: "diese vermutlich spätrepublikanische Schilderung des idealen Rechtsstaates"; *Abriss des röm. Staatsrechts* (1893) p. 145: "Wenn nach der allerdings weniger auf Tradition

Moreover, this historical view would lead to the conception of the Roman *iudex* as a delegate of the magistrate or the ancient King, and to the idea that his power to judge was derived from the *imperium* of the magistrate. But, as Jolowicz very aptly remarked, this is incompatible with the essence of the Roman procedure as Wlassak has made it clear to us. The Roman *iudex* is the arbiter elected by the litigants and he cannot be the delegate of the praetor at the same time.[6]

If we have to discard, as based on late and anachronistical ideas, the ancient tradition which connected the origin of the dual mode in Roman procedure with the making of the republican constitution (or—what amounts to the same—with the reign of the good King Servius Tullius)—is it then to be assumed that the dual mode existed already in the regal period? [7] If so, we have to accept that the Roman king could

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als auf Construction beruhenden römischen Rechtsanschauung es dem König frei steht in Strafverfahren wie im Civilprozess selbst den Spruch zu finden . . ."; Otto Lenel, *Zeitschr. d. Savigny-Stiftung,* Rom. Abteilung 24 (1904) 342: ". . . Fabel"; *id.* in Holtzendorff-Kohler's *Enzyklopädie* I, 318 n. 1: "ohne historischen Wert, Geschichtskonstruktionen einer späten Zeit"; Emilio Costa, *Profilo storico del Processo civile romano* (1918) p. 1; A. Steinwenter, *Streitbeendigung durch Urteil* (1925) p. 59 n. 5.

[6] The older misconception is to be found, among others, in A. W. Zumpt, *Der Criminalprocess der Röm. Republik* (1871) p. 15: "Der Einzelrichter des Civilprocesses beruht auf dem Grundsatz, dass die in dem Beamten verkörperte Richtergewalt übertragen werden darf. Der Beamte kann wegen der Menge von Geschäften nicht selbst entscheiden; er wählt einen Stellvertreter aus dem regierenden Stande, der, um die Parteien zufrieden zu stellen, nach der Vereinbarung derselben bestimmt wird." It is remarkable that Beseler, in *Zeitschr. Sav. Stiftung* 46 (1926) 132, still called the *iudex privatus* "Stellvertreter des Prätors," and A. Hagerström, *Der röm. Obligationsbegriff* (1927) p. 525, note 2 on p. 527: "öffentlicher Funktionär." One has to recall the study of Otto Lenel, "Iudicium" in *Zeitschr. Sav. Stiftung* Bd. 47 (1927) where he gives his opinion on Beseler's statement as follows: "Man staunt wenn man liest, wie hier aus einem frei erfundenen Zwölftafelsatz Folgerungen abgeleitet werden, die allem widerstreiten was den wirklichen Quellenzeugnissen zu entnehmen ist. Wo finden wir den iudex privatus als Stellvertreter des Prätors bezeichnet ? Wenn irgend etwas gewiss ist, so ist es von dem allem das Gegenteil" (p. 33).

[7] This view is found in P. Collinet et A. Giffard, *Précis de droit romain* (1926) p. 63: "La distinction du jus et du judicium se rattache à la plus an-

not settle a *quaestio facti;* that he lacked the power to put an end to any legal suit; that he had not what the German theory called *Judikationsgewalt.* But then the question arises: how does this view tally with the unquestionable *imperium* of the Roman King? Wenger stated the question very properly in these words: "Wie sollen wir uns einen Tarquinius Superbus vorstellen, der in Privatsachen nicht entscheiden durfte?"[8] (How can we imagine a Tarquinius Superbus not empowered to settle a private law suit?) The answer by Koschaker:[9] "das Imperium umfasst zwar alle Staatsaufgaben, aber doch nur diejenigen, die zu einer gegebenen Zeit als solche erfasst werden," asserts that the power to judge was as yet no public matter. But this is begging the question: Koschaker states as certain what is the very matter of doubt.[10]

Wenger starts from the unlimited power to judge that belonged to the Roman kings as a consequence of their full and absolute royal power. According to Wenger, Etruscan influence is to be assumed, and as a matter of fact modern writers on the oldest phases of Roman history are inclined to see a contrast between the Latin "house-king" and the Etruscan "state-king" and to consider the narrow bond that held together the Roman family and the *gens* as an old Latin

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cienne contume romaine, à l'époque ou il n'y avait pas encore de plébéiens." In the edition of the *Précis,* published in 1938 under Giffard's name (I, 92), Wenger's opinion is adopted.

[8] L. Wenger, *Institutionen des Röm. Zivilprozessrechts* (1925) p. 50 n. 72.

[9] P. Koschaker, *Zeitschr. Sav. Stiftung* 47 (1927) 510: "Mit dieser Erwägung dürfte sich Wengers Frage erledigen wie wir uns einen Tarquinius Superbus vorstellen sollen der in Privatsachen nicht entscheiden durfte."

[10] We find a *media sententia* in A. Giffard, *Leçons de procédure civile romaine* (1932) p. 12 note 3: "M. Wenger (et moi-même dans le Précis Dalloz) avons expliqué les jugements royaux par l'importation momentanée d'un système oriental sous les rois étrusques. Leur compétence au criminel, et dans les procédures par le serment me parait vraisemblable. Mais la disparition totale pendant l'époque étrusque de l'arbitrage des chefs des gentes me paraît peu probable." In the same vein, compare R. Monier, *Manuel* I (5 édit. 1945) p. 130.

cultural element, while ascribing the exalted public position of the Roman magistrate to the influence of Etruscan domination.[11]

Already in 1931 F. Leifer, in his work *Zur Vorgeschichte des Römischen Führeramtes*, had stressed (disagreeing with Mommsen, but in the same line of thought as Wenger) the probability of an original Latin-Indogermanic patriarchal kingship developing, under the rule of the Etruscan Tarquinii, into a despotism, and asserted that the conception of absolute, unlimited *imperium* had been the effect of this development. As a corollary of the absolute *imperium*, the Roman king would have been invested with the unlimited power to judge cases. But side by side with this royal administration of justice, Wenger supposed the existence of the purely private system of arbitration with which the king had nothing to do. This is said to have been a traditional element in the cultural pattern of the Latin-Indogermanic, immigrated population. With the beginning of the republican era, a compromise would have taken place: according to Wenger, the administration of justice by the king was replaced by the *iudex privatus*, chosen by the litigants and to whom the magistrate, bearer of the *imperium*, could give binding instructions. "So liesse sich vielleicht das eigenartige Mittelding erklären, das der römische republikanische Privatprozess darstellt." [12]

This view of Wenger did not find general approval and, as a matter of fact, it meets with difficulties which were immediately put forward by Koschaker and which, to my mind, are indeed of paramount importance. Wenger regarded this compromise (as it really would have been) as a republican or democratic limitation of the unlimited and absolute power of the Roman king [13] and drew a parallel with the *pro-*

[11] See, e.g., E. Kornemann, *Römische Geschichte: Die Zeit der Republik* (Leipzig 1938).

[12] L. Wenger, *Institutionen*, p. 23 n. 13; cf. pp. 22 n. 10 and 50 n. 72.

[13] L. Wenger, "Imperium romanum," *Deutsche Literatur-Zeitung* 37, 698 and *Institutionen*, p. 23, n. 13: "republikanisch-demokratische Einrichtung".

vocatio in penal affairs.[14] The objection against this view of Wenger is mainly that democratic tendencies were not the guiding principle: they were, in reality, wholly absent in the establishing of the Roman Republic. The republic inaugurated, as is well known, a rule of the nobility which lasted for centuries to come and offered few if any traits we could nowadays call democratic.[15]

The parallel with the *provocatio ad populum* fails because it does not touch on the judicial power of the magistrates, even if we accept that it dates from the first times of the Republic. Also Jolowicz in his article cited above rejects Wenger's hypothesis of a fusion and raises three objections: first, the *plena iudicatio* of the Roman *rex* rests on weak authority, as we have already seen. Secondly, it is not credible that the revolution which put an end to the regal period was in any sense a democratic one—one has but to remember that the *iudex privatus* was a patrician till the times of the Gracchi. And lastly Jolowicz points out that the *provocatio* dates from much later times.

On these and other grounds the thesis of Wenger, according to which the origin of the dual mode in the Roman procedure dates from the establishment of the Roman Republic, met with little approval. There is general agreement, however, that the origin must lie in a fusion of private arbitration and public administration of justice, and that this did not take place suddenly, but gradually in a long historical process which

[14] About *provocatio* see the recent study by Pugliese, *Limiti dell'imperium nella repressione penale* (Torino 1939); H. Siber, "Provocatio," *Zeitschr. Savigny-Stiftung* 62 (1942) 372-391 and 413-421.

[15] P. Koschaker, *Zeitschr. Sav. Stiftung* 47 (1927) 509 and *ibid.* 50 (1930) 724-725. Nevertheless Wenger still maintains his views in *Zeitschr. Sav. Stiftung* 60 (1940) xxvi: "Mich dünken immer noch diejenigen alten Quellen im Recht, die das Amt des Volksrichters, des Geschworenen, des iudex privatus, der allein unter Bürgern urteilen durfte, als republikanisch-demokratische Erscheinung hinstellen." Cf. Emilio Betti, in *Studi in onore di Chiovenda*, p. 118 note 5: "Le considerazioni di Wenger hanno, a mio avviso, il torto di non distinguere fra iudicatio penale-pubblico e iurisdictio in materia di diritto privato e di valutare in modo esaggerato la portata della cosidetta rivoluzione repubblicana."

placed the public authorities on an equal footing with an arbitral procedure wholly and purely private and voluntary in its origin. The effect was that arbitration became compulsory and subject to the control of the organs of the state.[16]

II

I should like to point out two objections to this *communis opinio*: [17]

(1) If it is probable that Rome had been for a considerable time under Etruscan rule, the question may be asked whether under an absolute Etruscan despotism a private arbitration for civil affairs could have existed with which the Etruscan tyrant had nothing to do.

(2) The study of comparative law has shown that wherever we find such private arbitration it is characterized by extreme formalism.

Jolowicz recognized the latter problem. He looked for formalistic elements in the procedure *apud iudicem.* He refers to the *Beweisurteile* of Germanic law, and of Babylonian

[16] Thus the opinion of Jolowicz (note 1 *supra*) p. 62, in agreement with Wlassak, *Anklage und Streitbefestigung im Kriminalrecht der Römer* (1917) p. 222; *Der Judikationsbefehl des röm. Prozesses* (1921) p. 247; *Zum röm. Provinzialprozess* (1919) p. 12 n. 3; P. Koschaker, *Zeitschr. Sav. Stiftung* 47 (1927) 509 and *ibid.* 50 (1930) 724-725: "Der Ursprung der Zweiteilung wird gefunden im Anschluss an Wlassak in dem Wesen des ältesten Zivilverfahrens als formalisierter Selbsthilfe mit anschliessendem Schiedsvertrag, den der Staat—wahrscheinlich schon in der Königszeit—obligatorisch macht indem er . . . den Abschluss dieses Schiedsvertrags vermittelt und kontrolliert"; E. Levy, *Zeitschr. Savigny-Stiftung* 46 (1926) 371f: "Das Verfahren in iure und damit die Anteilnahme des Staates an der Ziviljustiz wird in einer Zeit aufgekommen sein, in der der gesellschaftliche Zwang, einen Schiedsvertrag einzugehen und den vom Schiedsrichter gefällten Spruch zu erfüllen, nicht mehr zureichte und deshalb der Ruf nach Staatshilfe laut wurde. Wann dieser Augenblick kam, lässt sich nicht sagen. Mit dem Sturz des Königtums braucht er m.E. nicht zusammenzufallen. An sich könnte er sowohl vorher wie nachher angesetzt werden. Doch dürfte angesichts des noch von den Zwölftafeln auffallend häufig herangezogenen und gewiss nicht notwendig gerichtlichen pacisci (1.6.7; 8.2;) das letztere vielleicht mehr Wahrscheinlichkeit für sich haben."

[17] I borrow the term "communis opinio" for the view stated from A. Steinwenter, *Streitbefestigung* (1925) p. 6.

and Greek law, and remarks: "Since most of the persons whom the litigants call to their assistance are not Solomons, the methods suggested commonly involve an appeal to the supernatural powers, who alone can know the truth which is concealed from men." [18] This is the plain reason why we do find in every procedure of this kind *ordalia* and oaths, with the strictest formal rules as a consequence of their magic character.[19]

Jolowicz thinks that he has found such a medial judgment (*Beweisurteil*) in Rome in the procedure *in iure* and a final judgment in the procedure *apud iudicem.* The prevailing opinion, he says, will not accept this "because they regarded as untenable any theory which involved associating the Roman *iudex* with formal methods of proof." I believe that the prevailing opinion is really not so far amiss on this point. Generally speaking, of course, one may hesitate to affirm that even in the oldest Roman tradition there has never been any trace of formal methods of proof, such as *ordalia*, oath-helpers, etc.[20] Still, the undeniable fact remains that every concrete

[18] Jolowicz, *op. cit.*, p. 66.

[19] "Lo Stato primitivo presso qualunque popolo non ha assunto che una fase del processo e in sulle prime assai timidamente, cioè quella che con parola romana potremmo dire la *ordinatio iudicii;* ma la seconda fase, l'indagine della verità e della ragione, esso l'ha regolarmente rimessa a forze occulte e superiori, vale a dire al caso: l'ordalia, il duello giudiziario. il giustizio di Dio, la sorte. Il giudice non è strumento della ricerca della verità, ma della sua constatazione o meglio della constatazione di una verità simbolica e a ogni modo formale." P. Bonfante in *Mélanges G. Cornil* (Gand-Paris 1926) I, 125.

[20] "On dit Rome n'a connu ni les cojureurs, ni les ordalies. Je réponds à mon tour: Qu'en sait-on ? Que connaissons-nous des modes de preuves judiciaires pratiqués à Rome jusqu'au IIIe siècle avant l'ère chrétienne ? Les témoins des XII Tables étaient-ils des témoins au sens moderne du mot? même si on l'admet, il paraît bien difficile de croire qu'un système de preuves rationnelles ait existé à Rome à l'époque très reculée où a été imaginée la formule vindicatoire." H. Lévy-Bruhl, *Quelques problèmes du très ancien droit romain* (Paris 1934) p. 113. We do not find any rules of evidence in the classical law. "Es wird freilich keine irrige Vermutung sein, wenn wir solche Regeln für eine frühgeschichtliche Epoche annehmen: aber über Vermutungen kommen wir da auch nicht hinaus." L. Wenger. in *Festgabe für G. Hanausek,* p. 19-20.

scrap of evidence of their presumed existence has vanished.[21] Of trial by ordeal there is hardly a trace in the whole of Roman tradition, and none at all in Roman procedure.[22] The most detailed discussion of the question, to my knowledge, is given by Emile Jobbé-Duval, who has investigated whether in the Roman rules on oaths there are traces of ancient *ordalia*, as is the case in nearly all primitive legal systems. However, after careful study of all the available material concerning formal methods of proof in primitive law, Jobbé-Duval had to conclude: [23] "Assurément je ne puis citer aucun texte établissant qu'il en ait été de même chez les Romains".

So Jolowicz saw clearly our second objection to the *communis opinio* as stated above: everywhere the primitive, private, arbitral procedure shows an extreme formalism. Therefore, Jolowicz tried to find traces of formalism in the Roman procedure *apud iudicem*, or at least he went so far as to assume its existence. In my opinion, when no traces of formalism in Roman procedure *apud iudicem* can be found, this is simply because there never have been any. I am furthermore inclined to seek the explanation of the absence of formalism in the very point raised in the first place, namely the Etruscan domination with its absolute royal power.

I believe we have to assume that the origin of Roman civil procedure lies in the private arbitration; that this evolution occurred in a very remote period—in the age of the Roman kings, or even earlier; and that the Indo-Germanic tradition of the Latin people probably had its role in this development. But in the regal period, Etruscan rulers obtained unlimited

[21] "Spuren eines mystischen Appells an die Gottheit sind im römischen Strafrecht nicht nachweisbar." H. F. Hitzig, in *Zum ältesten Strafrecht der Kulturvölker. Fragen zur Rechtsvergleichung* gestellt von Th. Mommsen (1905) p. 44; cf. the same view of Th. Mommsen on p. 5.

[22] Cf. Ehrenberg s. v. "Losung" in Pauly-Wissowa, *R.E.* col. 1452; O. Schrader s.v. "Gottesurteil" in *Reallexikon der indo-germanischen Altertumskunde* hrsg. von A. Nehring (1917-1923) I, 407.

[23] E. Jobbé-Duval, *Etude sur l'histoire de la procédure civile chez les Romains*, I (1896) 31.

despotic power over Rome. The king became the appointed arbiter and administered justice as an absolute ruler in a Solomonian way, unconstrained by any formalistic rule. After the expulsion of the Etruscan tyrants we find in Rome a publicly authorized system of arbitration with a *civis* chosen as an arbitrator by the litigants, and not any more formalism than before. It is obvious that formalism cannot be introduced again after having once become obsolete.

Solomonian justice is, as we all know from I Kings 3:1 ff. and 3:16-28, quite the opposite of the formalistic Germanic process. Formalism was the guarantee of freedom; the rule of law could find its authority only in objective and strict rules of form, in what seems to us often mere formalities. They gave man the feeling that he was not at the mercy of the discretionary power of his fellow-citizens, but only subject to the law. This meant liberty to him. In a regime of despotism any guarantee of, or concern for liberty was altogether out of the question; an absolute ruler does not care for formalities or forms of procedure.[24] So the door could be opened much more easily to the search for material truth by rational methods of proof.

We know of many legends and old tales about wise king-judges like King Mariadi-Ramen in ancient India; the Egyptian King Bocchoris; Deiokes, the righteous judge who, according to Herodotus I.96, was elected King by the Medes, even as Cyrus by the Persians (I.114); and, what is still more to the point, there are many statements to the effect that in a primitive law system the king was sometimes elected by the parties as an arbitrator.[25] This is true of the old-Babylonian

[24] Cf. Henri Decugis, *Les Etapes du droit* (Paris 1942) p. 246, who mentions King Solomon and Saint Louis King of France "rendant la justice sans formalisme".

[25] I feel incompetent to appraise the value of the following statement about Israel, unsupported by quoted evidence: ". . . die Tatsache, dass die Rechtssprechung in den Händen der Aeltesten der Geschlechter bleibt und der König erst zum Eingreifen befugt ist, wenn sein Spruch angerufen wird." H. Bolkestein, *Wohltätigkeit und Armenpfege im vorchristlichen Altertum. Ein Beitrag zum Problem "Moral und Gesellschaft"* (Utrecht 1939) p. 62.

procedure[26] and it did happen with the ancient Germans about whom Caesar remarks "principes regionum atque pagorum inter suos ius dicunt controversiasque minuunt."[27] Neither in the Iliad nor in the Odyssey do we find a publicly appointed judge administering justice. The procedure is still based on an agreement of the litigants, who submit their case to a chosen arbiter. His task cannot have been only to give judgment, but also to settle the case. This applies primarily to the Homeric βασιλεύς or rather βασιλῆες who bear likeness either to the Mycenian kings or to the later ruling nobles of Ionia.

> Sicher aber hat keiner der homerischen βασιλῆες eine Königsgerichtsbarkeit in dem Sinne ausgeübt, dass er Rechtssprüche mit staatlichem Zwang bekleidet, erlassen hätte. Vielmehr war ihre richterliche Funktion in Streitigkeiten, die das öffentliche Interesse nicht unmittelbar berührten (in Zivilsachen) zunächst wohl an die Voraussetzung geknüpft, dass sich die Parteien an den König mit der Bitte um Schlichtung oder Entscheidung ihrer Rechtsstreites wandten.[28]

This is in complete accordance with, and so in turn is confirmed by, the detailed study of two American scholars, Robert J. Bonner and Gertrude Smith:[29]

[26] See J. G. Lautner. *Die richterliche Entscheidung und die Streitbeendigung im altbabylonischen Prozessrecht* (1922) p. 4-5: "Je grösser die Autorität des zum Schiedsrichter erwählten Mannes ist und je öfter jemand zu diesem Amte ausersehen wird, eine um so grössere Bedeutung muss seinem Schiedspruch beigelegt werden. Es ist von vornherein einleuchtend, dass der Rechtsspruch des zum Schiedsrichter gewählten Königs nur schwer abgelehnt werden konnte und dass wohl schon in sehr früher Zeit eine solche Ablehnung überhaupt nicht mehr möglich war."

[27] Caesar, *Bellum Gall.* 6.23.

[28] A. Steinwenter, *Streitbeendigung,* p. 31; cf. *Iliad* XIII.566f.; *Od.* XI.570 and Hirzel, *Themis, Dike und Verwandtes,* p. 35. Agreeing with Steinwenter: P. Koschaker. *Zeitschr. Savigny-Stiftung* 47 (1927) 508.

[29] R. J. Bonner and Gertrude Smith, *The Administration of Justice from Homer to Aristotle,* I (Chicago University Press 1930) 29f. In the following quotation, footnotes are taken from Bonner and Smith, except for n. 36 and one addition in n. 32.

> They [the Homeric Greeks] had a system of challenge and wager for the purpose of inducing a reluctant opponent to submit to arbitration. It was only a question of time until arbitration became obligatory in case either party desired it. Naturally the disputants would seek to obtain the services of a person who had a reputation for impartiality and wisdom, without regard to rank or official position. Even a woman, Arete, queen of the Phaeacians, acted as an arbitrator.[30] But the prestige of the king must have marked him as the natural arbitrator. And it is the arbitral function of the Homeric kings that Aristotle [31] has in mind when he says that they tried cases (*τὰς δίκας ἔκρινον*). Homer, it is true, nowhere depicts a King dispensing justice. But this is a mere accident, for Idomeneus proposed to Ajax to submit their dispute to Agamemnon.[32] Minos, settling disputes in the spirit land, certainly had his prototype in such kings as Nestor, who *περὶ οἷδε δίκας*, and Sarpedon, who *Λυκίην εἴρυτο δίκῃσί τε καὶ σθένεϊ ᾧ*.[33] Everywhere in ancient times kings and tyrants exercised judicial functions.[34] Deioces of Persia and Peisistratus [35] of Athens administered justice as arbitrators. Accordingly, we are justified in assuming that the Homeric ruler, whether a Zeus-nourished king or the official head of an aristocratic government, was constantly called upon to act as arbitrator.[36]

Is there any trace in Rome of a similar state of things? Dionysius made some assertions which point this way, but on

[30] *Od.* VII.74.

[31] Aristotle, *Polit.* 1285b.

[32] *Il.* XXIII. 485 [*δεῦρό νυν, ἢ τρίποδος περιδωόμεθ'ἠὲ λέβητος*, (486) *ἴστορα δ' Ἀτρεΐδην Ἀγαμέμνονα θήομεν ἄμφω*. Cf. Bernhöft, in *Zeitschrift für vergleichende Rechtswissenschaft* 2 (1880) 322].

[33] *Od.* III.244, *Iliad* XVI.542.

[34] Here Bonner and Smith refer to Herod.I.14, 96-97, 100; II.129; II Sam. 15:2.

[35] Arist. *Ath. Polit.* XVI.5, cf. Herod. VI.38.

[36] Cf. Hesiodus, *Theog.* 84-90 and the notes in the edition by Paul Mazon (1928). The older literature in P. F. Girard, *Organisation judiciaire* (1901) p. 26 note 1.

the grounds given above I am not prepared to take them too seriously. King Numa is said to have been elected as an arbitrator by the neighbouring tribes (2.76): διαλλακτῆρας ἐποίοντο Ῥωμαίους καὶ ἐπὶ διαιτητῇ Νόμᾳ τὰς ἔχθρας διαλύειν ἠξίουν. Elsewhere (10.1) he says of the Roman kings: οἱ βασιλεῖς . . . ἔταττον τοῖς δεομένοις τὰς δίκας. Another, weak, piece of evidence might be gathered from Livius I.40: "Cum ambo regem appellarent . . ."; a better one, in the excuse of Tarquinius Superbus for being late at a meeting of Latini of high rank: "disceptatorem, ait, se sumptum inter patrem et filium, cura reconciliandi eos in gratiam moratum esse"; and I submit to reread in this light the lines of Cicero *De Rep.* 5.2.3 quoted above: "nec vero quisquam privatus erat disceptator aut arbiter litis sed omnia conficiebantur iudiciis regiis." This can be meant to say that the disputing parties did not elect as an arbitrator a common citizen, but the king himself.

Thus it is not incorrect to describe, with Leifer,[37] the essential nature of the oldest Roman procedure in these terms: "Sein Wesen schöpft dieses Verfahren aus dem nationalrömischen Gedanken, die Schlichtung von Streitigkeiten zwischen Bürgern in die Hand eines einzelnen angesehenen, des Vertrauens beider Parteien würdigen, weil unparteiischen Mitbürgers zu legen"—but this leaves totally unexplained the unique fact that the formalism which is so characteristic of private arbitration in ancient times (*Sühnevertrag*) is wholly lacking in Rome. I believe that the explanation of this absence of formalism lies in the fact that the Etruscan absolute rulers gave judgment in a Solomonian way, as elected arbitrators and without regard to formalistic methods of proof. I therefore disagree with Emilio Betti,[38] who considers

[37] Fr. Leifer, *Die Einheit des Gewaltgedankens im röm. Staatsrecht* (1914) p. 165.

[38] Emilio Betti, "La creazione del diritto nella iurisdictio del pretore romano," *Studi in onore di G. Chiovenda* (1927) p. 118f: "Da un complesso d'indizi concordi si desume che la funzione preminente dei rè dovette consistere nell' uffizio di giudici: giudici sopratutto in materia di diritto pubblico penale e sacrale—ove essi esercitavano la tremenda *potestas vitae necisque*—

the Roman king as the precursor of the magistrate of republican times who controls the phase *in iure*. In other respects this might be true, but I might look upon the Roman-Etruscan tyrants as the precursors of the *iudex privatus* of Republican times.

My thesis, advanced to elucidate the origin of the dual mode in Roman procedure, rests on the combination of two data: Firstly the assumption, generally accepted nowadays, that before the Republic, Rome has been under the sway of Etruscan rulers who exercised absolute regal power; and secondly on the remarkable fact that in the Roman procedure *apud iudicem* no trace of a formal system of evidence has been detected, neither in ancient nor in Republican times. I have tried to explain the latter by the former.

H. R. Hoetink

University of Amsterdam

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ma anche, sebbene più di rado, in materia di diritto privato (familiare, penale e patrimoniale). Giudici, in quest' ultimo campo, non già nel senso che decidessero essi stessi le controversie fra privato e privato, ma sì nel senso che ne controllavano la precisa formulaziare giuridica (*ius dicebant*) e—non diversamente dai pretori—ne imponevano la compromissione in arbitri: arbitri che probabilmente erano i pontefici." The same view is held by Betti in his review of Wenger's *Institutionen* (1925) in the *Rivista di Diritto Processuale Civile* (1928) p. 73: "il rè, in materia di controversie fra privato e privato, si limitasse a controllare la formulazione giuridica delle questioni e ad imporne la compromissione in arbitri (nel che consiste il *ius dicere*)," and in Betti's handbook, *Diritto Romano* I, Parte Generale (1935) p. 451. I think this view underestimates the absolute power of the Etruscan tyrants and leaves unexplained the absence of formalism in the presumed procedure before the *pontifices*, the later procedure *apud iudicem*.

MILES PRO PARTE TESTATUS PRO PARTE INTESTATUS DECEDERE POTEST

THE rule we deal with [1] derogates the well-known principle of the old Roman law which forbade the concurrence of succession testamentary and without testament.[2] It is not just an exception to that prohibition [3] but a particular aspect of the *ius singulare* which grew in the field of military testaments especially during the late classical period.[4] In fact, at the time of the Severi, the rule, "miles et pro parte testari potest" was put in practice and enforced by the princeps.[5]

From a formal point of view, the rule no doubt goes back to imperial law. This does not solve, however, the problem of its origin. The problem is to establish the basis on which this *ius singulare* was created. Certainly it was to exercise great influence on the further development of Roman hereditary law.

Because of the source of the rule, and because the theories on the origin of the military testament are not as yet defini-

[1] D. 29.1.6 Ulp.; D. 36.1.17.6 Ulp.; D. 49.17.19.2 Tryph. (rule derived from a post-classical glossator); C. 6.21.1.2 Imp. Anton.—Significant in D.50.17.7 Pomp. is the interpolation *in paganis,* plainly relative to the rule.

[2] D. 50.17.7 Pomp.; Inst. 2.14.5; C. 6.59.8 Imp. Dioclet. See Suman, *Favor testamenti e voluntas testantium* (Rome 1926) 19ff. with bibliography; Biondi, *Successione testamentaria e donazione* (Milan 1942) 584ff.

[3] We may consider as exceptions to the principle, "nemo pro parte testatus" etc., some cases deriving from the *querella inofficiosi testamenti;* from the *ius adcrescendi* of daughters and granddaughters left out in the will; from the *bonorum possessio contra tabulas.*

[4] Orestano, "Ius singulare e privilegium," *Annali Univ. Macerata* XI, 50ff.

[5] See for instance C. 6.21.1, 2, 3 Imp. Anton.

tely settled,[6] the general opinion sees in our rule the natural consequence of the emperors' favor of the soldier's last will. Especially in the late classical period the *simplicitas* and the *imperitia* of the bequeathing military men were protected by the emperors.[7] Now, we do not call this into question, all the more since the *caput ex mandatis* of the emperor Trajan [8] and some papyrological sources show beyond doubt that ever since Cæsar's time the emperors allowed soldiers to dispose *mortis causa* freely of their possessions: thus they hoped to avoid annulment of military testaments by the principle of the *ius civile*.[9] Still, this statement does not solve our problem. Indeed, if the rule, " miles pro parte testari potest " should be but a development of the principle that the military testament is founded on *nuda voluntas,* it remains to be seen in what manner this *favor voluntatis* was operative in creating the rule. Therefore we have to look for its juridic reasons and constructions, keeping in mind that the most remarkable innovations of the imperial time resulted from preceding developments which adapted the law to the changing social needs.

In order to place the problem back into its proper field, we should abandon the preconceived idea that the rules of military testaments permitted soldiers to arrange the *heredis institutio* at all times and in every case *ipso iure* according to the *voluntas testantis*. This may have been true, but only in the late classical law when both legislative and jurisprudential activities in support of the military testament were at their peak. Before that time, all cases not considered in the emperors' statutes would be dealt with by the jurisprudence through indirect proceedings and traditional constructions,

[6] Arangio-Ruiz, " Sull'origine del testamentum militis," *Bull. Ist. Dir. Rom.* XVIII, 157ff.; Guarino, " Sull'origine del testamento dei militari nel diritto romano," *Rendiconti Ist. Lombardo* LXXII, 85ff.

[7] D. 29.1.1 Ulp.; D. *h.t.* 24 Florent.

[8] See Ulp. *loc. cit.*

[9] See now Biondi, *Istituzioni* (Milan 1946) 518.

for the *intrerpretatio* had to remain in the orbit of the enacted law.[10]

In particular, we do not believe that the privilege of the *institutio ex re certa,* from which the rule derives, is simply the result of the principle of enforcement of the testator's will, as is generally affirmed.[11] The sources offer the possibilty of discerning two different stages of development in this field. Some texts (though interpolated) make the *institutio ex re certa* available as such to the *miles;* but from a passage of Gaius we learn, on the contrary, that where several persons are appointed with an allotment of specific things that entirely exhaust the estate, they are considered as heirs *sine partibus* and obtain the specified objects as pre-legacy. On the one hand, we have Ulpian's texts:

> D. 29.1.6 *de testamento militis.* Ulpianus libro quinto ad Sabinum (*de testamentis: de institutionibus vitiosis*).[12] Si miles unum ex fundo heredem scripserit, creditur [13] quantum ad residuum patrimonium intestatus decessisse: miles enim pro parte testatus potest decedere, pro parte intestatus.
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> D. 36.1.17.6 *ad SC. Trebellianum.* Ulpianus libro quarto fideicommissorum (*ad SC. Pegasianum: ut heres adire cogatur*).[14]. . . eleganter Marcianus libro sexto fideicommissorum ait, qua ratione ex certa re miles heredem instituere potest actionesque ei dabuntur, pari ratione etiam ex Trebelliano transibunt actiones . . .

Some obvious alterations notwithstanding, the two passages are untouched in their substance as far as our problem is con-

[10] On this point, in the field of military testaments, see, e.g., C. 6.21.3 Imp. Anton.

[11] Perozzi, *Istituzioni* (2nd ed.) II, 552; Bonfante, *Istituzioni* (10th ed.) 597 n.1.

[12] Lenel, *Palingenesia* II, 1030.

[13] So *Dig.* ed. Mediol.

[14] Lenel, *Paling.* II, 915.

cerned.[15] The texts assure us that in Ulpian's time the appointment of an heir *ex re certa* ordered by a *miles* was *ipso iure* effective, leaving aside the part of possessions not bequeathed by the testator. On the other hand, Gaius presents a quite different case:

> D. 29.1.17 pr. *de testamento militis.* Gaius libro quinto decimo ad edictum provinciale (*de bonorum possessione ex testamento militis*).[16] Si certarum rerum heredes instituerit miles, veluti alium urbanorum praediorum, alium rusticorum, alium ceterarum rerum, valebit institutio perindeque habebitur, atque si sine partibus heredes eos institutisset resque omnes suas per praeceptionem cuique legando distribuisset.

Here indeed the *institutio ex re certa* is considered valid, not as such, but by the same construction which we generally find in the field of testaments: that is, through the fiction of considering the *mentio rei* as not written. But this mention does matter when the objects (*corpora*) are divided, for each appointed person obtains only the *res certa.*[17] The *nomina hereditaria,* however, are equally divided, by-passing the testator's will. The diversity between the proceedings mentioned by Gaius and the rules transmitted by Ulpian seems to suggest that an evolution took place between the times of the two jurists.

Much more remarkable is the next paragraph of Gaius' text, where Julian is quoted as saying, "quasi duorum hominum hereditates intellegi," when the soldier appoints one heir with allotment of the castrensic possessions and the other, with the remaining goods. In this manner the heirs severally acquire the *corpora* and the *nomina* according to the testator's will:

[15] On frag. 6 see Beseler, in *Studi Riccobono* I, 298, rather fanciful; on frag. 17.6 see *Index Interpolationum,* ad loc.

[16] Lenel, *Paling.* I, 223.

[17] D. 28.5.35 Ulp., largely interpolated; on the problem in general, Mancaleoni, "Appunti sulla institutio ex re certa," *Studi Sassaresi* II, 90ff.; David, *Studien zur heredis institutio ex re certa* (Leipzig 1930); Ciapessoni, in *Studi Bonfante* III, 772ff.

> D. *h.t.* 17.1. Iulianus etiam ait, si quis alium castrensium rerum, alium ceterarum scripsisset, quasi duorum hominum duas hereditates intellegi, ut etiam in aes alienum, quod in castris contractum esset, solus is teneatur, qui castrensium rerum heres institutus esset, extra castra contracto aere alieno is solus obligetur, qui ceterarum rerum heres scriptus esset . . .

No doubt, *quis* stands for *miles,* as the context and contents of the fragment show. Still, the connection points to a slip on the part of Justinian's compilers who probably referred the opinion to another context than that where it was quoted by Gaius. Some mistakes in the *consecutio temporum* strengthen this hypothesis.[18] But the fragment is plainly genuine in its substance and certainly deals with the military testament.

Taking this for granted, the discrepancy between Gaius' decision and that of Ulpian remains surprising. It has been tried to solve it by means of dialectical devices rather than by textual arguments. Interpolationist critique, on the other hand, although admitting that on principle the style of the Gaius fragment is not suspect, strikes out the passage, *perindeque—distribuisset,* as an addition of Tribonian, generalizing the rules of the military testament.[19] The solution is unconvincing; it is derived from the preconceived idea mentioned above. Likewise, the idea of a doctrinal development taking place in the short time between two jurists of almost the same period should be abandoned. Therefore the discrepancy should be solved quite differently.

I believe the key to the question is the peculiar Roman idea of the *bona castrensia,* as compared with the *cetera bona.* The *miles* upon leaving civil life acquired a specific legal status: therefore, the castrensic possessions were considered as a separate property unit.[20] This meant actually a double

[18] Beseler *loc. cit.*

[19] So Arangio-Ruiz, *op. cit.* (n.6) 160 n.3; see also Ciapessoni, *op. cit.* 776.

[20] On this point, all authors are in agreement. See Fitting, *Das castrense peculium* (1871) 18; Tamassia, "Testamentum militis e diritto germanico," *Atti Ist. Veneto* LXXXVI, 32f.

construction of the testator's property and personality: he was thought of as *miles* in regard to the *bona castrensia,* and as *civis* in regard to the *bona non castrensia.* It is quite in conformity with other sources [21] when Julian says, "quasi duorum hominum hereditates esse intellegi."

It now becomes easy to reconcile the apparent contrast between the two parts of the fragment in question. By assuming two distinct personalities, it became possible (1) to appoint heirs who take only the castrensic possessions, considered as the property of a distinct body, the *miles.* The rule, "nemo pro parte testatus pro parte intestatus decedere potest" was safe, and the legal heirs could succeed in the remaining goods as heirs of another body, the *civis.* It became possible (2) to appoint simultaneously one heir with the *bona castrensia* and another, with the *cetera bona,* the two

[21] Compare the following texts: D.10.2.25.1 Paul.: the *iudicium familiae erciscundae* does not take place if the soldier has appointed one heir with the castrensic possessions and another, with the remaining goods; see David, *op. cit.* (n.17) 33 n.72; Arangoi-Ruiz, *op. cit.* 160 n.3 (the end is interpolated: Beseler, *op. cit.* 295).—D.16.2.16 pr. Papin.: a debtor of the castrensic possessions who is at the same time a creditor of the *cetera bona,* cannot plead set-off of claims after the death of the soldier, if the latter appointed two different heirs. The fragment seems to have undergone alterations. Beseler (*Subcisiva,* p.9) rightly replaces the words *non audietur* by *exceptio doli locum non habet.* —D. 29.1.11.2 Ulp.: if a *filius familias* bequeathes the *peculium castrense* while unaware of having become *sui iuris,* the father's possessions are not transferred to the heir appointed with the *peculium* but to the legal heir. The reason given in frag. 12 *h.t.* Papin. is probably a gloss (Beseler, *Stud. Ricc.* I, 298), likewise so in frag. 13 pr. Ulp.—D. 38.2.3.6 Ulp.: "Patronus contra ea bona liberti omnino non admittitur, quae in castris sunt quaesita," i.e. because the castrensic possessions belong to the testator not in his capacity as freedman but as soldier.—D.38.2.42.1 Papin.: the patron does not obtain *bonorum possessio contra tabulas* if the inheritance was accepted only by the heir appointed with the castrensic possessions. Likewise, if the heir appointed with the civil possessions does not accept, this does not result in an increase of the estate for the other heir: see La Pira, *La successione ereditaria intestata e contro il testamento* (Firenze 1930) 382 n.2.—C.6.21.2 Imp. Anton.: "Miles si castrensium tantummodo bonorum commilitonem suum instituit heredem, cetera bona eius ut intestati defuncti mater eius iure possidebit." The reason is that the *cetera bona* belong to the soldier not as *miles* but as *civis.*

masses being considered as two separate properties, of the soldier and of the citizen.[22]

In this construction the ancient rules were formally observed, but at the same time it created the basis for the privilege of *institutio ex re certa* in the soldier's testament and with it, the principle, "miles pro parte testari potest." Thus, from the practical point of view, the Romans overcame both the prohibition of appointing heirs with an assignment of special objects, and the old rule which forbade concurrence of testamentary and intestate succession. The *interpretatio* observes the formal principles but destroys their roots.[23]

D. 29.1.17.1, then, allows us at last to solve the problem of the origin of the rule, "miles pro parte testatus pro parte intestatus decedere potest." From what was said it follows that we are not presented with a development of the emperor's permission to the bequeathing soldiers but with an enlargement of the peculiar rules in force for the *bona castrensia.* Indeed, while up to the time of Gaius and Julian appointments of heirs with particular objects were valid *ipso iure* only for the castrensic possessions,[24] all restrictions fell at the time of the Severi, as is attested by the remarkable number of imperial ordinances aiming at the protection of the soldier's will.

22 See David, *op. cit.* 33 and n. 72a. The dualist conception and its consequences end when the owner of the castrensic possessions is no longer *in militia,* D. 49.17.19.2 Tryph.; D. 29.1.13.1 Ulp.: "si iam veteranus decessit . . . bona eius etiam paterna ad heredem pertinere Marcellus . . . scribit."

23 David 33ff.

24 The appointments of which Gaius writes in D.29.1.17 pr. could be considered valid indirectly, for the heirs in this case were appointed with objects that were not, according to the rules of the military testament, *hereditates duorum hominum.* For this reason, and in order to save the testament and carry out as far as possible the testator's will, they were assimilated to *heredes sine partibus,* with rights only in the allotted *corpora.* The result becomes evident in the *iudicium familiae erciscundae.* Such heirs were entitled to it, for the prohibition of this *iudicium* (D. 10.2.25.1 Paul.) applied exclusively to cases of dual appointments with castrensic possessions and remaining goods. For similar applications, see Sciascia, "In tema di actio familiae erciscundae," *Archivio Giuridico* CXXXII, 48f.

The limitations which the jurisprudence necessarily had observed in allowing such privileges were all lifted during that late time of the classical law. Therefore we may conclude that our rule, although it largely developed through the imperial jurisdiction as an aspect of the *ius singulare* concerning the military testament, nevertheless took its beginning in the interpretations of the jurists, on the basis of the peculiar Roman concepts of *bona castrensia* and *status militis*.[25]

Gaetano Sciascia

Universidade Catolica
Sao Paulo, Brasil

[25] On the jurisprudential activity in the matter of *peculium castrense* see now Guarino, "L'oggetto del castrense peculium," *Bull. Ist. Dir. Rom.* N.S. VII, 41ff.

THE INTELLECTUAL BACKGROUND OF SAVIGNY *

FRIEDRICH KARL VON SAVIGNY (1779-1861) together with Niebuhr, ushered in the century of great German bourgeois scholarship, at the close of which the figures of Helmholtz and Dilthey rose.

Savigny was representative of this period, though from a social point of view he did not properly belong to the middle classes: the family of Savigny held the rank of imperial nobility for many centuries. It is, however, to the middle classes as expressing the strength of the body politic that he referred and he saw in them the guarantor of its duration.[1] Thus for good and bad, one may speak of Savigny as a representative of German bourgeois scholarship. We become aware of the limitations of the great jurist of the University of Berlin,[2] limitations forced upon him partly by the character of his generation, partly by his own personality, if we remember the two men who preceded and succeeded him in the study of the basic aspects of Roman law: Gian Battista Vico (1668-1744), the great Neapolitan thinker, and Johann Jacob Bachofen (1815-1887), the colleague of Jacob Burckhardt and Friedrich Nietzsche at the University of Basle. Also if we place Savigny between the two men who influenced him decisively

* Paper read at the meeting of the Riccobono Seminar of Roman Law in America, Washington, D. C., April 24, 1947. The reader of the present volume will recall the appraisal of the historic position of Savigny in the Holy Father's allocution on the Bl. Ferrini, as printed above.

[1] "Wesen und Wert der Deutschen Universitäten," first published in the *Historisch-Politische Zeitschrift,* edited by Leopold von Ranke, 1832; then, *Vermischte Schriften* (Berlin, 1850), IV, 307f.

[2] Academic career of Savigny: 1800, Privatdozent in Marburg; 1802, Professor extraordinarius in Marburg; 1808, Prof. ordin. in Landshut; 1810, Prof. ordin. in Berlin. In 1842 he resigned his chair to become Prussian Minister for the Revision of Legislation, till 1848.

in his own country and in his own time, Goethe and Schelling, we immediately perceive that there existed in the famous jurist what one may call a typical nineteenth-century optimism involving a good deal of superficiality. A man who can easily be paralleled with Savigny, one who was also a pioneer and leader in his field, Leopold von Ranke, said in the eulogy of Savigny which he gave at the Academy of Sciences in Munich, "Savigny loved the civilized world of his time" and he trusted it. "Nothing was to him so distasteful as chaotic conditions or the rule of the vulgar element; he hated it."[3] He trusted the civilization of his time; he remained unaware of the threatening trends constantly at work under its surface. On the other hand, Savigny would not have been the truly great discoverer and master in his field that he was, had not his attitude been based on a genuine philosophy of life, even though this philosophy was never systematically clarified.[4]

To understand his basic position it is necessary to survey briefly the elements which were instrumental to it. Friedrich Karl von Savigny came from Central Germany. He was born in Frankfurt am Main, the city of Goethe, in 1779, thirty years after the great poet. Throughout his life he enjoyed every economic and social privilege, another point of similarity in the comparison with Goethe.

Decisive in the formation of Savigny's attitude were the experiences he underwent as professor at the University of Berlin in the years preceding and during the wars of deliverance against Napoleon. From more than one point of view the formative years of the University of Berlin could be called its greatest epoch, though, of course, its renown and influence grew stronger many decades later.[5] Together with Schleier-

[3] Leopold von Ranke, *Sämtliche Werke* (Leipzig, 1888), vols. 51/2, p. 499.

[4] F. Guizot, *History of Civilisation* (New York, 1885), IV, 36 blames Savigny for "the absence of general views and conclusions"; this blame is certainly not justified in its first part. Cf. also *ibid.* II, 222ff.

[5] Max Lenz, *Geschichte der Universität Berlin* (Berlin, 1910ff.).—See on Savigny: Ernst Landsberg, "Friedrich Karl von Savigny," in *Allgemeine Deutsche Biographie,* 30 (Leipzig, 1890); Ernst Landsberg, *Geschichte der*

macher and Niebuhr, Humboldt, Fichte and Neander—most of them, like Savigny, not Prussian-born—Savigny developed during these years of trial a genuine Prussian patriotism that was to last all his life. He enjoyed the opportunities and facilities in the capital for a broader life. He drew close especially to Niebuhr, attending regularly the lectures of this explorer in early Roman history. Both of them found in the study of ancient Roman history solace and hope in the midst of the political anxieties of their own time. (The political factor in German humanism should not be overlooked because of its more conspicuous aesthetic element; it existed in the eighteenth and nineteenth centuries as well as it does in the twentieth.) Of course, Savigny had already been trained in Roman law and its history. He stresses the importance to himself of the teaching of Philipp Friedrich Weis (1766-1808) [6] and he pays generous tribute to the influence, both that of the man and that of the writer, of Gustav Hugo (1764-1844) whose main works were published in 1792 and 1798. But one is tempted to state that the decisive steps Savigny took, went far beyond those of his masters; that they were largely due to the experience that made ancient history, and so also Roman law, a living and meaningful force in his own life.

The words Niebuhr wrote of himself, "One can separate from work only reluctantly in the evening and wake up im-

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Deutschen Rechtswissenschaft, III, 2/1 (München und Berlin, 1910), 186ff. There is a rich monographic literature; see especially: Hermann Kantorowicz, "Savigny and the Historical School of Law," *Law Quarterly Review,* 53 (1937), 326-343; Erik Wolf, in *Grosse Rechtsdenker der Deutschen Geistesgeschichte* (Tübingen, 1944), 436-508 (with good bibliography). Basic for any biographical study on Savigny: Adolf Stoll, *Friedrich Karl von Savigny. Ein Bild seines Lebens mit einer Sammlung seiner Briefe* (3 vols. Berlin, 1927ff.). For a discussion from the historiographical point of view: Ernst Troeltsch, *Der Historismus und seine Probleme* (Tübingen, 1922), chapter III, section 3, pp. 277ff.; Erich Rothacker, *Einleitung in die Geisteswissenschaften* (Tübingen, 1930), pp. 37-62, 89-100.

[6] Letters of Savigny to Weis during the years 1804 to 1807 have been published by Wilhelm Felgenträger in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte,* Roman. Abteilung, 48(1928), 114ff.

patient to continue," can be applied to Savigny as well. A truly Benedictine enthusiasm was alive in him.

Savigny's was certainly not an authentic political nature. In this respect, an autobiographical note is discerned in the sentences he wrote about the political attitude of the medieval Glossators, assigning to them an intermediate position between the enthusiastic supporters of the right and the left wings. Referring back to Ranke's eulogy, it is observed that he too perceived Savigny equally far from both extremes, caring only for the just measure. It was consistent with his moderation that his political activity came to an end in 1848. Forces which he never would be able to understand appeared on the political scene in that year. He had not enjoyed, and had no reason to enjoy, his activity as Minister of the Revision of Legislation. Like Ranke, he had chosen the Hohenzollern kings as his sovereigns. Both remained completely loyal to them; both moreover had many contacts with Bavaria and with the dynasty of the Wittelsbach. When Savigny settled in Berlin, he admitted that much of what he had thoroughly relished at the Bavarian University of Landshut, he would never find in the Prussian capital.[7]

Characteristic of Savigny's position within the Romantic movement is his attitude towards one of the political problems that meant much to many of the German Romanticists, especially at the time of the Congress of Vienna, the question of the reshaping of a German Empire.[8] In his correspondence with his more enthusiastic friends, first among them the Grimm brothers, he refers to the problem frequently. In this respect, too, the author of the treatise "On the Vocation of Our Times for Legislation and Jurisprudence" advocates postponement of a settlement until the nation is mature and

[7] Otto Lenel, "Briefe Savignys an Georg Arnold Heise," *Zeitschrift der Savigny-Stiftung* etc., 36(1915), 119, Letter of VII/12, 1810: ". . . Ich habe in Landshut viel herrliches zurückgelassen (neben sehr schlechtem), vieles was ich wohl hier (in Berlin) nicht wieder finde . . ."

[8] Cf. letters of June and November 1814. Stoll, *op. cit.* II, 109, 118f., 125f., 131f.

ready for it. The meaning of postponement, however, is that Savigny rejects the Austrian Habsburg solution, while not admitting that conditions are ready as yet for the Prussian Hohenzollern alternative. While he may have conceived of an ultimate Prussian primacy in Germany, he was then, and remained, much more interested in the German nation as a cultural unit than as a political one. Here too are evidences of Romanticism.

There is no doubt about the Protestant structure of the fundaments of Savigny's politico-social thought. He expresses in his letters assent to the theory which accepts the wicked ruler without any show of resistance,[9] a theory taught by Luther but also to be found in the Institutes of Calvin,[10] a theory which was to attain tragic influence and importance in Northern Germany. According to it, one acknowledges the wicked ruler as evidence of Divine wrath, as a deserved punishment meted out by God and offers no resistance. This theory became actuality with the political troubles that broke out in Hanover in 1837, resulting in the banishment of the famous Seven from the University of Goettingen. Here Savigny certainly did not live up to the expectations of such friends as the Grimm brothers, who themselves were among the seven sacrificed professors.

Savigny was permeated also with the Protestant tenet which assigned to every calling religious dignity, which considered one's calling not as a job, but as a duty imposed upon man to build the temple of God out of the daily activity,[11] glorifying God according to one's vocation. Savigny followed here the concept as it developed with Calvinistic activism

[9] Letter to Bluntschli, X/7, 1839; Stoll, II, 359.

[10] Cf. book IV, chapter XX, "On Civil Government".—However, in this chapter are included also those sentences that reveal a truly activistic attitude, e.g.: ". . . for sometimes he raises up some of his servants as public avengers, and arms them with his commission to punish unrighteous domination . . ." (ed. Allen, II, 549).

[11] Letters I/24, 1824: Stoll, II, 316; II/28, 1834: *ibid.* 353f. O. Pfülf, S.J., "Friedrich Karl von Savigny als Ireniker," *Stimmen aus Maria Laach,* 66 (1904), 168; Letter to Ringseis, VIII/23, 1816.

rather than Luther's more quietistic approach. In contrast to Luther also, Savigny thought he was serving God *per vocationem* and not merely *in vocatione*.[12] In this belief one's vocation became an office assigned to each man by God and one could grow into closest union with God through activity within that vocation.[13]

About those political conceptions on which Savigny did not declare himself, much can perhaps be guessed from the fact of his collaboration with Ranke in editing the short-lived *Historisch-Politische Zeitschrift* from 1832 until 1835. To it Savigny contributed two major articles.[13a] Ranke tells us that for a period they met every day, and while he remarks that they did not agree on every issue, we may think that it is hardly a mere coincidence that the two people, "Friedrich" and "Karl", whose conversation makes the "Politische Gespräch", the last article Ranke contributed to the *Zeitschrift,* have been given the two Christian names of Friedrich Karl von Savigny. In this article and in the earlier one on the Great Powers, published in the *Zeitschrift* in 1833, Ranke expressed the essence of his political philosophy. Both of them were final expressions of an attitude which had developed through many centuries and which saw a special dignity bestowed upon the growth and intercourse of the

[12] E. Troeltsch, *The Social Teaching of the Christian Churches* (New York, 1931), p. 610.—The history and the analysis of the concepts "vocation", "calling", "Beruf" was one of the subjects of Max Weber's famous articles "Die Protestantische Ethik und der Geist des Kapitalismus", published separately at Tübingen, 1934. Weber traces the "Berufs" concept back to Luther's translation of Eccli. xi. 20f. He perceives the beginning of that development in the sermons of Tauler, the German mystic († 1361). For this part of his investigation Weber uses the work of Karl Eger, *Luthers Anschauungen vom Beruf* (Giessen 1900).—The writer can not accept the negative aspects involved in G. A. Kelly's review of *From Max Weber, Essays in Sociology* (Oxford University Press, 1946), in *The Catholic Historical Review,* 33 (April 1947), 63ff.

[13] Letter VIII/23, 1816: Pfülf, *loc. cit.* 168; and O. Pfülf, "Savigny und die Dinge in Bayern," *Stimmen aus Maria Laach,* 67 (1904), 201; II/28, 1834.

[13a] "Vom Wert der Deutschen Universitäten" first published in Ranke's *Historisch-Politische Zeitschrift* I, 569ff.; "Die Deutsche Städteordnung," *ibid.* I, 389ff.; both later in the *Vermischte Schriften;* IV, 270ff. and V, 183ff.

Great Powers, those political entities of modern history, by assigning to them a spiritual element and by believing that in their history, at some rare moments, the historian may find the finger of God, the expression of the thoughts of God. The final sentences of the essay on the "Great Powers" read:

> "Universal history does not offer such casual reciprocal impact, collapse and succession of states and nations as may appear at first sight. . . . We perceive forces, intellectual and spiritual forces, creating life and being life themselves; we perceive moral energies which develop. We cannot define them; we cannot put them into abstract forms . . . but we can see them; we may observe them. . . . The secret of universal history rests in their mutual action and succession, upon their life, their disappearance or their rebirth, which is always marked by an increased copiousness, a higher importance and an enlarged sphere."

Would it be too rash to see in these sentences the expression also of Savigny's political-historical creed?

The limitations, however, of this point of view become evident if we think about that concept of universal history: it means the growth of the Western World and is based on a belief in its lasting continuity. Remembering Toynbee, and in this respect, Spengler, one is tempted to think of a progress in historical thought, but we may in this connection also remember some of the historiography of the Englightenment and that of Vico and Herder.

One more historical problem was in the minds of both Ranke and Savigny. It may be called "the Bossuet question", since Bossuet's *Discours sur l'Histoire Universelle* centers about it: how can Divine Providence be perceived in history? It is known that Ranke, in contrast to the boldness of Hegel, was extremely cautious in answering it. Savigny, who deals with the problem not in his published writings but in his letters shows even more restraint. It is true that he speaks of manifest miracles God worked for the Germans in

the wars of deliverance.[14] He insists on the secrecy of the Divine chronology; [15] he is convinced that evil trends are sent to an age by God as a test from which men are not allowed to shrink; [16] he believes that God Himself will evoke the spirit and mind of the German nation to accomplish what is beyond the reckoning of the statesmen.[17] However, in discussing the reasons for the turn that the human mind takes in the great creative ages of history, Savigny thinks that the historian cannot proceed further than to state the readiness of the mind to start a new intellectual life. Human knowledge cannot disclose the real cause.[18]

Much stronger than the political impulses were the religious ones in Savigny. He was raised according to the Reformed Protestantism, his mother having been a Reformed, his father a Lutheran, Protestant. He married a devout Catholic, a sister of the Romantic poet Brentano. All his children were Catholics, and one of the sons, who had collaborated with Bismarck, was to become a co-founder of the Center party. As a result of the years spent at the University of Landshut, Savigny developed a need of genuine communion with friends. Some of his most intimate were outstanding Catholics, as Sailer, who was to become Bishop of Regensburg [19] and whom Savigny held in esteem second to none.

[14] To Ringseis, XI/14, 1820: Pfülf, *Stimmen,* 66, 313; to Jac. Grimm, XI/18, 1820: Stoll, II, 270f.

[15] To Ringseis IX/26, 1829: Pfülf, 67, 197; to Perthes, July 1832: C. Varrentrapp, "Briefe von Savigny an Ranke und Perthes," *Historische Zeitschrift,* 100 (1908), 346.

[16] "Wert und Wesen der Deutschen Universitäten," in *Vermischte Schriften,* IV, 289.

[17] To Jac. Grimm XI/8, 1814: Stoll, II, 125.

[18] *Geschichte des Römischen Rechts im Mittelalter,* V, 204f; cf. *ibid.* VI, 410.

[19] On Sailer, see S. Merkle, "Johann M. Sailer," in Sebastian Merkle and Bernhard Berg, *Religiöse Erzieher der katholischen Kirche aus den letzten vier Jahrhunderten* (Leipzig, s.a.), pp. 185ff; Franz Schnabel, *Deutsche Geschichte im XIX. Jahrhundert,* vol. IV (Freiburg, 1937), pp. 50ff; 477f.

Others were the Bavarian physician, Ringseis,[20] the Brentano family and some, as the Creuzers, who were enthusiastically interested in the history of religion and mythology.

When Savigny drew up a list of the books he cherished most, the *Imitatio Christi* ranked first with its "woe to those who inquire of men about many curious things." It was followed by the German mystics, as Tauler or the eighteenth-century pietist Tersteegen. Mention was also made of the writings of Sailer, though Savigny believed their author as a man "stands high above all his books."[20a]

In accordance with trends apparent among some of the best of that generation,[21] Savigny hoped for the growth of a "secret Church," of which Catholics and Protestants could be members. He considered his own marriage a token of such a communion. He believed that this secret Church permeated all the centuries and all the Christian confessions. Did not Chateaubriand, as Ambassador of France to Rome, address the Pope in 1829 on such a union?[22] Sailer, though always remaining strictly within the limits set by the Catholic Church, was not strange to such hopes. Others, as Martin Boos, a Catholic priest, dear at one time to both Sailer and Savigny, almost went astray, and Johann Gossner, another of this group, came to the end of his life as a successful Protestant minister in Berlin. It is not difficult to trace parallels in the Protestant camp in Northern Germany, especially in the circle around the Crown Prince, the future Friedrich Wilhelm IV. They lead to the still enigmatic figure of General von Radowitz

[20] Savigny's correspondence with him discussed by O. Pfülf, *loc. cit.*—For the influence of Savigny on Doellinger, *cf.* Lord Acton, *History of Freedom* (London, 1922), p. 376.

[20a] To Hermann Bang, Protestant pastor, III/7, 1840: Stoll, II, 525; cf. also to Jacob Grimm XII/29, 1817: Stoll, II, 239f.—Sailer translated and annotated the Imitation in the years 1794-99, after he had been dismissed from his chair in Dillingen, Merkle, *op. cit.* 191.

[21] For a discussion of these trends in Germany see Schnabel, *loc. cit.;* for Savigny, especially letter to Jac. Grimm, XII/19, 1817: Stoll, II, 239.

[22] *Mémoires d'outre-tombe,* book VII, Dépêche à Mr. le Comte de la Ferronays, Rome, I/12, 1829.

and were to exercise influence on Prussian policy in the 'forties.

Setting apart the question of whether or not Savigny fully understood their innermost thought, there seems good reason to assume that Goethe and Schelling were the men who influenced him most. Of his opinion of Goethe we find evidence in a letter to Jacob Grimm written in October, 1810: [23] "Goethe once more affected me with love and veneration. I do not know of anything but an attitude like his which gives so much joy to living and which keeps one on the right track." Goethe, in a conversation with Eckermann, referred to the jurist as "our excellent Savigny." [24] Some inclinations in Savigny's mind paralleled those in Goethe. Dispositions and forces similar to those which led the poet to admire Roman art enthusiastically, led Savigny to find delight in Roman law and to bring forth his last work, the *System.*

The influence Schelling exercised on the mind of Savigny in his formative years may have been the ascendant one. It is hardly possible to overrate the impact of the early Schelling on his contemporaries, Goethe included. It suffices to mention here that, since the end of the eighteenth century, all trends in social, political and historical thought referring to, or based upon the "organism" concept, would scarcely have been possible without that influence. Savigny, in a letter of April, 1800, recounts Schelling's ideas on the development of art and the aims of the artist, stressing the concept that the work grows without or beyond the conscious awareness of the artist, "He achieves his purpose to which God has led him and full of surprise he looks at the work he created." [25] For such an idea Schelling might have been indebted to Winckelmann's History of Ancient Art. It determined Savigny's conception of the development of law, especially of Roman law; the role

[23] Stoll, II, 57.

[24] Conversation of IV/6, 1829.

[25] Stoll, I, 152f; cf. Landsberg, *Geschichte* III, 2/1, 215: ". . . (er) schaut verwundert das Werk an, das er schuf." For Savigny, cf. f.i. letter to Ringseis II/28, 1834: Pfülf, *loc. cit.* 67, 201.

he assigned to the great Roman jurists was shaped according to this concept. And of his juridical principles the concept of organism became the necessary basis.

It is not of much importance to discuss in this connection the question of whether or not Savigny was a member of the Romantic school, a question that already has been studied in detail. No doubt, there existed important ideological affinities and many personal links; on the other hand, significant divergencies may be found. Much depends on the definition given to the concept of Romanticism, a term that still lacks definite clarification. However one should not forget those traits of Savigny's mind that made him, like Goethe, like his friend Sailer, a child of the eighteenth century; Ranke stressed these traits in his eulogy.

Savigny enjoyed the congenial intercourse of the Romantic group. He was influenced by their ideas on individuality, the personal individuality as well as the collective, and by their concepts of growth and development in the realm of history, all ideas and concepts which provided a topic, apparently inexhaustible, for discussion and publication. This never-ending delight in observing and tracing the development of historical individualities was to become a common subject of Savigny's writings, discussed in his prefaces if no other opportunity presented itself, and forming the core of much of his correspondence, such as that with the Grimms and the philosophers, the Creuzers.

Stressing his ties with the Romantics seems more helpful in explaining Savigny's peculiar approach than does referring to his relations to the historical-juridical empiricists like Weis and Hugo. These references can be traced back to Puetter, the teacher of public law at Goettingen, and to the authors of the political "tableaux," the treatises on the "interests" of the Great Powers. Such references may be correct as far as single impulses are concerned, but they do not present us with the clue necessary to understand the unity in Savigny's thought. Certainly Savigny himself held that his work

formed a part of that tidal wave that rose in reaction to the eighteenth century or, more specifically, to the Enlightenment rationalism.

When Wilhelm von Humboldt recommended Savigny in the summer of 1810 for an appointment at the University of Berlin, then in the process of formation, he spoke of the young professor's philosophical treatment of jurisprudence and of his genuine and rare philological scholarship. Savigny, at that time, had published only his dissertation on a subject in criminal law and his famous monograph on *Possession*, 1803.

In an open letter of Spring, 1819,[26] Jacob Grimm dedicated his *Historical Grammar* to Savigny, whose lectures he had attended in Marburg. There, he said, he had been taught what it meant really to study a subject, whether jurisprudence or any other. Savigny enjoyed his activity as a university professor. He thought highly, very highly indeed, of its social dignity, but also of the obligations incumbent on this "calling", and this attitude endeared to him the intellectual climate that then existed in Berlin.[27] It would be difficult to think of more significant representatives of the intellectual atmosphere of the Hohenzollern capital in the first half of the nineteenth century than Savigny and Ranke.

In his best known, though perhaps not his greatest work, *On the Vocation of Our Time*, written in 1814, Savigny declared that two faculties were equally necessary to, and characteristic of a jurist,[28] (a) the historical sense, to grasp properly the particular character of every period and every juridical form, and (b) the systematic sense, to perceive the connection and the interdependence of a single concept with the whole system. It was the peculiar quality of Savigny's

[26] Stoll, II, 172.

[27] Many letters on this subject, f.i. VIII/5, 1820: Stoll, II, 267; cf. also the articles "Rezension von F. Schleiermacher, Gelegentliche Gedanken über Universitäten in deutschem Sinn" (1808) und "Wesen und Wert der Deutschen Universitäten" (1832), in *Vermischte Schriften*, IV.

[28] *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Freiburg, 1892; references will be given according to this edition), p. 29.

mind that enabled him to make equally important contributions in both respects. His first publication, *Possession*, 1803, and his last one, *System of the Contemporary Roman Law*, 1840-1849, give evidence of this systematic sense, while the two writings of his middle period, *On the Vocation*, 1814, and the *History of Roman Law during the Middle Ages*, 1815-1831 (a second, revised edition appeared 1834-1851), bear ample witness to the historical ability of their author.[29]

We turn now to our central topic, the meaning and importance of Roman Law to Savigny. From the systematic point of view, which he considered indispensable to the jurist, Savigny thought of Roman Law as an almost perfect organism, so "lively," so balanced was the interdependence of its concepts and sentences.[30] He enjoyed in a truly aesthetic way the possibility presented by Roman Law to practice the art of logic.[31] In the *System* he described this systematic approach as the presentation of the inner connection and relationship through which single legal concepts build up a large unit. It considers the Law, as much as possible, as an organic whole. No better pattern for this task, Savigny repeated, could be found than the work done by the great Roman jurists.[32]

It is generally known that Savigny was the founder of the Historical School of Law, mainly through his treatise *On the Vocation* and the program which he outlined in the opening issue of the journal for Historical Jurisprudence, the journal he founded and which bears his name even today.

[29] In addition five volumes of articles, partly of an historical, partly of a systematic character have been published as *Vermischte Schriften* in 1850.

[30] *Beruf*, pp. 29, 72.

[31] *Geschichte des Röm. Rechts im Mittelalter*, VI, 8 (references according to the first edition).—R. von Jhering, *Gesammelte Aufsätze* (Jena, 1882), II, 17, emphasizes the practical aspect and value in S.'s work; but by doing so, it has not been proved that the "systematic sense" of S. is not rooted in aesthetic foundations, in an enjoyment of a pure formal achievement.

[32] *Beruf*, p. 13f.; *System des heutigen Römischen Rechts* (Berlin, 1840; references to the *System* are made to this first edition) I, xxxvi f., xliv.

In these publications of his middle period the consequences were drawn from the premises of Schelling and the Romantics. Law is conceived as an organism analogous to language, the other phenomenon dear to the heart and the mind of the Romantics. Both phenomena have no isolated existence but rather are particular aspects of the life of a nation with which they rise, develop and decline. We find here that concept of the nation which, in an uninterrupted intellectual development, can be traced back at least to Montesquieu's *Esprit des Lois*.[33] The nation is seen as a huge and super-individual collective organism, the center of political and historical life. Each nation possesses an individuality. This individuality may also be ascribed to its most important expressions or creations, language and law.[34] Through language and law is expressed that which Savigny, following the lead of Herder, was to call, in the *Vocation*, the common national consciousness, " das gemeinsame Bewusstsein des Volkes." Eventually he accepted the term coined by Hegel, the " Volksgeist," the national spirit.[35]

Thus for Savigny, Roman Law was not the *ratio scripta* presented in the Justinian Code. Roman Law was not made by great individual jurists. It had its own individuality, or, properly, it was one of the most important expressions of that great individuality, the Roman nation. As such it was linked to the life and the history of this nation. Therefore it was important to understand clearly the national character. In

[33] Earlier examples of such an organistic concept can be found, f.i., with John of Salisbury and Marsilius of Padua.—The concept presents a secularization of the *Corpus Mysticum*. A penetrating analysis of this process will be developed in E. Voegelin's work on the History of Political Thought to be published by Macmillan.

[34] *Beruf*, p. 7.

[35] Just as, according to S., the jurist had to limit himself to the task of finding the already existing expression of the national spirit within the legal sphere, so he described in 1814, the year of the *Vocation*, also the work of the statesman as " to unveil what really exists ", " nichts mit Willkühr machen zu wollen sondern das wahrhaft Seyende zu enthüllen ", letter to Wilhelm Grimm, IV/29, 1814: Stoll, II, 104.—Cf. *System*, I, 14f., 79.

examining the theories assuming the existence of collective individualities, the crucial question has always been how to describe concretely the character of such individualities. Savigny did not shrink from the task, and he described the character of the Romans as it existed, one and the same, throughout the different periods of their history, and as it expressed itself in all stages of the development of Roman Law.[36] This character he understood to be based on a lively political sense, which enabled the nation to rejuvenate its public and private law in such a way that new forms grew out of the old ones, so that there existed always an equilibrium between the conservative forces and the progressive ones. The Romans kept the traditional institutions just as long as they did not become obsolete.[37]

This description, though not a very precise one, corresponds to what Niebuhr thought constituted the basic quality in Roman history. It corresponds furthermore to what Niebuhr, and not he alone, believed to be distinctive in the English character. The important observation for Savigny was that the same individual character prevailed throughout the history of Roman Law.

In a famous chapter of the *Decline and Fall of the Roman Empire*,[38] Gibbon surveyed the history of Roman Law. How differently did the Whig historian of the late eighteenth century present this story than did the jurist of Berlin one generation later! Gibbon emphasized the changes which occurred. He saw in the history of Roman Law a revolution which extended over almost one thousand years.[39] At the beginning, pride and ignorance ruled; slowly enlightened reason pre-

[36] *Beruf*, p. 19.

[37] Cf. the statement on Roman historical writing made by R. G. Collingwood, *The Idea of History* (Oxford, 1946), p. 34: to the Romans "history meant continuity: the inheritance from the past of institutions scrupulously preserved in the form in which they were received."

[38] Chapter 44; quotations according to the edition by J. B. Bury.

[39] *Ibid.* IV, 455.

vailed. To achieve this latter end, the praetors used means which Gibbon did not hesitate to call absurd.[40] He insisted on the steady growth of Roman jurisprudence until the age of the Antonines; "the civilians (of this time) had studied the works of their predecessors; their philosophic spirit had mitigated the rigour of antiquity, simplified the forms of proceeding, and emerged from the jealousy and prejudice of the rival sects." [41]

If we look for a pattern for Savigny's narration, we may rather think of the attitude held by Winckelmann in viewing ancient art as a whole and in so presenting its history. He wanted to tell the history of art and not the biographies of the single artists. His approach was used earlier and in a broader field, in Vico's *Scienza Nuova.* It was repeated in Savigny's own time for Roman history by Niebuhr. To Gibbon the history of Roman Law was mainly the history of great jurists, even though he also took into consideration the general conditions of the times.

To Savigny, Roman Law is an historic individuality. The individualities of the single jurists disappear. He refers to them as being, from his point of view, interchangeable, "fungible," personalities.[42] He admitted that only relatively small fragments of their writings have been preserved, but he felt confident that our opinion would not be changed if all their works were known to us. (And yet, Savigny wrote *On the Vocation* in the decade in which the Gaius codex was discovered and took intense interest in this discovery.[43]) Even Gibbon had drawn attention to the several races and nationalities of the "Roman" jurists.[44] In a letter early in

[40] *Ibid.* IV, 449.

[41] *Ibid.* IV, 466.

[42] *Beruf,* p. 96.

[43] Two articles kept in the *Vermischte Schriften* give evidence of S.'s interest in this subject.—The Gaius codex was discovered by Niebuhr in Verona in 1816.

[44] *Op. cit.,* IV, 465.

1834, Savigny spoke of the individuals as being unconscious instruments of an invisible general process of development.[45]

According to Gibbon, Roman Law rose from very low beginnings to that unique height of which the fragments of the great jurists of the third century, preserved in the Justinian codification, still give shining evidence to the world. Savigny also insisted that the period of Papinian and Ulpian was one of unique perfection as far as the method and technique of jurisprudence were concerned, but he emphasized that the basic attitude, the underlying spirit, was the same that had existed for as long as we know of any Roman Law.[46] To Savigny, that period, which was one of the eternal glories of the Roman genius, which established a pattern for the legal studies of all times and all nations because of its systematic accomplishments, represented, nevertheless, a late and relatively weary age, in which the work, that in earlier and healthier periods was done by the whole of the national community, had been handed over to specialized organs, to the jurists proper who, to some extent, were necessarily separated from the rest of the nation.

We may see how this point of view led Savigny to study early and even pre-Roman law.[47] From that point of view there could develop Bachofen's approach in the second half of the century. Bachofen saw in Roman Law but one branch of ancient life in general, and, going far beyond Savigny, perceived in Roman Law ancient jurisprudence exclusively and

[45] To Ringseis, II/28, 1834: ". . . eines allgemeinen unsichtbaren Entwicklungsprozesses, dessen bewusstlose Organe die einzelnen sind". Pfülf, *Stimmen,* 67, 201.

[46] *Beruf,* p. 19f.

[47] Cf. S.'s letter referring to early Roman law, April 1815: Stoll, II, 129; letter to Heise, X/26, 1812: Lenel, *loc. cit.* 131; the following articles in the *Vermischte Schriften,* vol. I: "Verbindung der Centurien mit den Tribus" (first published 1805); "Beitrag zur Geschichte der Römischen Testamente" (first published 1815). "Ueber die juristische Behandlung der Sacra Privata bei den Römern" (first published 1816); vol. II: "Ueber das altrömische Schuldrecht" (first published 1833).

not a jurisprudence that had any validity for modern times.[48] More and more Bachofen was driven to the search for origins against which Savigny had warned in the *Vocation.* For Bachofen, however, valuable suggestions were to be found in old legal institutions that were still kept in later times although their original meaning was no longer understood. He said of the ancient sepulcral symbols, for example, that they continued unchanged though they were not understood any more.[49] On the other hand, a way back points from such views of Savigny to the earlier, great attempt of Vico, although of such basic concepts of Vico's as "the authors of the nations" and the *diritto eroico* no traces are found in the work of Savigny.[50] It is consistent that Savigny should emphasize the remnants of Republican times as found in the later Roman Law. While Gibbon referred in somewhat sceptical terms to the edict of the praetor, Savigny considered as very important the discovery that the most significant sections of Hadrian's Edictum could be traced back to the Republican period. The

[48] "Lebensrückschau" written for Savigny in 1854, reprinted in: Johann Jacob Bachofen, *Mutterrecht und Urreligion,* ed. by R. Marx (Leipzig, 1926), p. 3f.

[49] Preface to "Gräbersymbolik" (first published 1859), *op. cit.* 26.—S. excludes explicitly the investigations of the origins, *Beruf,* p. 5.

[50] How far was S. acquainted with the writings of Vico?—According to a letter to F. Creuzer, VII/14, 1807, S. by then did not know of Vico; Stoll, I, 304. Around 1822, S. gave a copy of the *Universal Law* by Vico to K. H. Müller, who published a translation in 1854, with notes comparing Vico's doctrines with the ideas of Hegel, Hugo, Niebuhr and Savigny. B. Croce, *Bibliografia Vichiana* (Napoli, 1904), p. 12.—The rendering in M. H. Fisch and Thomas Goddard Bergin, Introduction to *The Autobiography of Giambattista Vico* (Cornell University Press, 1944), p. 71 is not exact.—In all probability S. read at some time Wolf's article in his *Museum der Altertumswissenschaft* (1807) on "G. B. Vico on Homer." Certainly he was acquainted with J. K. Orelli's article on "Niebuhr and Vico", since he made tacit reference to it in his article on Niebuhr 1829, reprinted *Verm. Schriften,* IV, 217f., cf. Fisch and Bergin, *op. cit.* 69f.—Savigny's sentence concerning Vico's ideas on Roman History (*loc. cit.*): "No one could profit from them who had not already found the truth in his own way" recalls his saying in the Preface to *Geschichte,* I, p. xiii: "nobody can say how much he found in reading the sources simply because he was looking for it".

honor of Roman Law, he wrote,[51] was vindicated by this discovery. As he said in the *Vocation,* not only the material, but the method itself of the Roman jurists, came from the ages of liberty.[52]

Savigny found a twofold dignity in the history of Roman Law. It presented to the world the rare spectacle of a sphere of national life that was allowed to achieve its full and uninterrupted development as an organism. Furthermore, it could be considered as an expression for which the genius of its nation was particular fit: thus it could reach its incomparable systematic value; thus the nation attained a definite peak in and through its Law.

There is, however, another point to be considered. Here again Savigny's attitude can be paralleled with Ranke's as the latter expressed it in the preface to the *Universal History,* his last work.[53] "I dare say that the whole of history would be valueless if the Romans had not existed," for it was primarily from the Romans that the continuity to be observed in our civilization stemmed.

Savigny believed it peculiar of modern history that no genuinely national development in religion, literature or law was assigned to the modern nations.[54] Thus while some of the nationalistic members of the Historical School deplored the reception of Roman Law for having falsified beyond repair the legal expression of the German national spirit, Savigny saw in the uninterrupted existence of Roman jurdical thought throughout the Middle Ages a special, and not at all despicable, characteristic of the history of the German nation. To the history of Roman Law in the Middle Ages his greatest historical work is devoted.[55] It was meant to fulfill a double

[51] "Rezension von Hugos Lehrbuch der Geschichte des Römischen Rechts" in *Vermischte Schriften,* V, 30f.

[52] *Beruf,* p. 19.

[53] *Beruf,* p. 22.

[54] *Beruf,* p. 23.

[55] *Geschichte des Römischen Rechts im Mittelalter,* 1st edition (6 vols.) 1815-1843; 2nd ed. (7 vols.) 1834-1851.

task, to describe how Roman Law underwent influences from, and exercised influences on, German law. In effect, the first aspect prevailed by far. It was as if, following Vico's terminology, Savigny had set out to describe the "ricorso" of this cherished collective individuality, to follow the course it took from the collapse of the Roman Empire until that general rebirth of sciences and arts that usually is ascribed to the fifteenth and sixteenth centuries.[56]

A characteristic position can be observed in this *History*. It appears when the author is dealing with the Glossators of the twelfth and thirteenth centuries, who flourished chiefly in Bologna. It is easily noticed that Savigny took a particular interest in this school of experts in Roman Law, a school whose endeavors and achievements the reader is tempted to put beside those made by the jurists of the early Roman Empire. One is reminded of the saying of the French historian Michelet, "If I am superior to other historians it is because I had loved more." Not only Michelet thought that an historian is at his best when he attempts to understand out of a feeling of congeniality rather than when he attacks and criticizes. It may even be that he fully understands only then. "This is only a way of saying that the historian's thought must spring from the organic unity of his total experience, and be a function of his entire personality with its practical as well as its theoretical interests." [57]

Hermann Kantorowicz in an interesting article in the *Law Quarterly Review* blamed Savigny for having made himself the spokesman of professional interests in his work, *The Roman Law in the Middle Ages*.[58] Such a reproach is not

[56] The work was soon criticized for presenting a literary history rather than a history of the legal institutions as its title seemed to promise.

[57] R. G. Collingwood, *The Idea of History*, p. 305.—By quoting from *The Idea* I do not wish to give the impression that I accept all tenets as proposed in the book; I do not, but I consider it as highly stimulating for the historian.

[58] "Savigny and the Historical School of Law," *Law Quarterly Review*, 53 (London, 1937), 326-343.

justified. Savigny says in the preface to volume I,[59] "Nobody can say how much he found in reading the sources simply because he was looking for it." Reading and writing the history of the Glossators, Savigny bore in mind the problems of his own life and age. Thus, he sees this medieval school, like the University of Berlin, rise, not so much because of the will of a government but "out of an inner necessity", evoked by the ardent intellectual interest of the epoch.

Like Hugo and Savigny, these Bolognese jurists had drawn their strength from the study of that wonderful Roman Digest which Savigny never grew tired of praising. He spoke of the "all-sanctifying" study of the sources in a letter to Georg Arnold Heise.[60] Whether or not the Digest had fallen into oblivion in the early Middle Ages—: there, in Bologna in the twelfth, and in Germany in the nineteenth century, it was read and studied with a new, vivifying spirit.[61]

In medieval Bologna, as in the faculty of law at Berlin, the professors worked in the theoretical as well as in the practical field, giving once more evidence of the "mingling of theory and practice" that Savigny praised in the jurists of ancient Rome.[62] Here and there the jurisconsults considered themselves called upon to enact reform in the legal order.[63] In all their work, Savigny thought, the intellectual height reached was due largely to the dignified social position which the members of the university faculties enjoyed and to the fact that scions of the noble families were glad to accept university appointments. "Considering those circumstances," Savigny wrote,[63a] "the renaissance of jurisprudence in Bologna does not appear as a work of hazard anymore." Still

[59] *Geschichte,* I, xiii.

[60] Lenel, *loc. cit.* p. 108.

[61] *Geschichte,* III, 77; for contrast, cf. *ibid.* I, ch. v on the inadequacy of pre-Bolognese studies.

[62] *Beruf,* p. 77; *System,* I, xxv.

[63] *Geschichte,* V, 201.

[63a] *Ibid.* III, 81f.

something more was needed and was provided in the intellectual receptiveness of the age, the readiness to start a new intellectual life, a condition that existed alike in medieval Bologna and in nineteenth-century Prussia. Human knowledge, according to Savigny, can state the existence of such a condition; it cannot explain it any further.[64]

The autobiographical character of such passages becomes fully evident when their author takes up the defense of the Glossators against the reproach of servility and of lack of national feeling.[65] He starts by rejecting some specific thirteenth-century accusations, then continues:

> It is a somewhat awkward undertaking to pass uniform judgment on a whole class; but we may expect that the jurist will rise in defense of lawful liberty and will be opposed to revolutionary arbitrariness whether this arbitrariness appears as the oppression of a despot or as the overthrow of lawful government. And indeed the Glossators were faithful to this honorable task, also at those times when difficult conditions prevailed.

One more aspect of the evaluation of the work of this medieval school may have been in Savigny's mind; however, he did not discuss it explicitly. When a nation grew older, so he may have reasoned, its expression and creations in the different orders—and thus also in the realm of law, which in the early stages had been the work of the whole community —withdrew to more specialized groups acting as representatives of the community.[66] This had been the role of the jurists of the early Roman Empire. A similar task was performed in the Middle Ages by those North Italian schools of jurists like the Bologna Glossators. Did not an analogous vocation be-

[64] *Ibid.* V, 204f.

[65] *Ibid.* V, 216f; the volume was published in 1829, the eve of the revolutionary year.

[66] Cf. *System,* I, 17f., 50.

stow here and now a special dignity on the work of the German jurists at the beginning of the nineteenth century? [67]

In reviewing Gustav Hugo's *History of Roman Law,* published in 1806, Savigny concluded, "A merely useful work gives answers to questions that every worthwhile scholar has asked already. The work of a genius puts its finger on problems of which we have been unaware. Such a work enlarges and elevates our concept of science; it makes us conceive unknown regions far away." [68] These sentences one may also apply to the work of Savigny, and one may add these words taken from Ranke's eulogy: [69]

> " Great teachers have been given to us not so that we may cling to their words and repeat them continuously. It is the spirit alone that vivifies in the realm of science also. The merit of great works consists in their opening new paths and starting on them independently and successfully. They are built on the basis of a scholarship already acquired, but they investigate the fundaments, they evoke moments which have been forgotten, and thus they give to the searching mind direction leading to a more comprehensive truth and to a broader vision. In such men we find coincidental the trends of the general studies of an age and those of an individual genius. So-called intuition matters little; the genius must grow strong through sincere and uninterrupted work on his subject. If such is the case, then we have to take into serious consideration what he proclaims is his conviction, even though he fails to give complete evidence for it."

FRIEDRICH ENGEL-JANOSI

THE CATHOLIC UNIVERSITY OF AMERICA

[67] Cf. also the discussion of the necessary conditions for the juridical Renaissance since the fifteenth century, *Geschichte,* VI, 20.

[68] *Vermischte Schriften,* V, 36.

[69] *Werke,* 51/2, 497.

Notes and Reviews

BIBLIOGRAPHY OF ANGLO-AMERICAN STUDIES IN ROMAN, GREEK, AND GRECO-EGYPTIAN LAW AND RELATED SCIENCES

II

(1945-1947)

This second bibliography primarily covers the period from April 1945 to April 1947, but there are a considerable number of additions dating from the years included within the first bibliography (1939-1945). A careful search of some further thirty classical and historical journals and a score of legal periodicals published in India, Australia, South Africa and the colonial possessions of the United States leads the authors to believe that as far as legal works are concerned the bibliography is as complete as careful effort can achieve, while in the related social sciences no significant item has been omitted.

The bibliography lists "works in Roman, Greek and Greco-Egyptian Law and institutions that have appeared in the Anglo-American world." The last phrase has been defined to include, besides the normal items in English, papers published in foreign languages (and thus generally by foreigners) in Anglo-American periodicals, as well as articles of Anglo-American scholars in foreign publications, as far as available. The use of the English language by other authors in foreign publications does not, it seems to us, entitle the item to inclusion herein.

New editions of, and a few corrections to works listed in the first bibliography, as well as reviews of works therein are indicated by the addition of the letter *a* to the original number. The "Index of authors" comprehends both bibliographies.

Adolf Berger
École Libre des Hautes Études
New York

A. Arthur Schiller
Columbia University
School of Law

List of Abbreviations

Am. Hist. Rev. = American Historical Review.
Am. J. Arch. = American Journal of Archaeology.
Am. J. Philol. = American Journal of Philology.
Am. L. School Rev. = American Law School Review.
Angl. Theol. Rev. = Anglican Theological Review.
Ann. Inst. Philol. Hist. Orient. = Annuaire de l'Institut de Philologie et d'Histoire Orientales et Slaves. Vol. VII (1939-1944), published in New York.
Berytus = Berytus. Archeological Studies published by the Museum of Archeology of the American University of Beirut.
Boston U. L. Rev. = Boston University Law Review.
Brit. Year Book Intern. L. = The British Year Book of International Law.
Brooklyn L. Rev. = Brooklyn Law Review.
Bull. Polish Inst. = Bulletin of the Polish Institute of Arts and Sciences in America (New York).
Byz. = Byzantion, Vol. XVII (published in Baltimore).
Byz.-Metabyz. = Byzantina-Metabyzantina. A Journal of Byzantine and Modern Greek Studies. Vol. I (New York, 1946).
Cal. L. Rev. = California Law Review.
Camb. L. J. = Cambridge Law Journal.
Cath. Hist. Rev. = Catholic Historical Review.
Cl. Bull. = Classical Bulletin.
Cl. J. = Classical Journal.
Cl. Outl = Classical Outlook.
Cl. Philol. = Classical Philology.
Cl. Q. = Classical Quarterly.
Cl. Rev. = Classical Review.
Cl. Weekly = Classical Weekly.
Crozer Q. = The Crozer Quarterly (Crozer Theological Seminary, Philadelphia).
Econ. Hist. Rev. = Economic History Review.
Engl. Hist. Rev. = English Historical Review.
Ét. Pap. = Études de Papyrologie.
Fordham L. Rev. = Fordham Law Review.
Geo. L. J. = Georgetown Law Journal.
Harv. L. Rev. = Harvard Law Review.
Harv. St. Cl. Philol. = Harvard Studies in Classical Philology.
Harv. Theol. Rev. = Harvard Theological Review.
Hesp. = Hesperia.
Hist. St. Austr. N. Zeal. = Historical Studies of Australia and New Zealand.
Ill. L. Rev. = Illinois Law Review.
Iowa L. Rev. = Iowa Law Review.
Ir. L. Times = *Irish Law Times.*
J. Am. School Cl. St. Athens = Journal of the American School of Classical Studies at Athens.

J. Bibl. Lit. = Journal of Biblical Literature.
J. Comp. Leg. = Journal of Comparative Legislation and International Law.
J. Econ. History = Journal of Economic History.
J. Eg. Arch. = Journal of Egyptian Archeology.
J. Hell. St. = Journal of Hellenic Studies.
J. Hist. Ideas = Journal of the History of Ideas.
J. Jur. Pap. = Journal of Juristic Papyrology.
J. Leg. Pol. Soc. = Journal of Legal and Political Sociology.
J. Marshall L. Q. = John Marshall Law Quarterly.
J. Rel. = Journal of Religion.
J. Rom. St. = Journal of Roman Studies.
Jew. Q. Rev. = Jewish Quarterly Review.
Jew. Soc. St. = Jewish Social Studies.
Jur. Rev. = Juridical Review.
Jurist = The Jurist.
La. L. Rev. = Louisiana Law Review.
Law. Guild Rev. = Lawyers' Guild Review.
Law J. = Law Journal.
Law J. Ohio St. U. = Law Journal of Ohio State University.
Law Q. Rev. = Law Quarterly Review.
Mediev. Hum. = Medievalia et Humanistica.
Mem. Am. Acad. Rome = Memoirs of the American Academy in Rome.
Mich. St. Bar J. = Michigan State Bar Journal.
Mod. L. Rev. = Modern Law Review.
Neb. L. Rev. = Nebraska Law Review.
Notre Dame Law. = Notre Dame Lawyer.
Oreg. L. Rev. = Oregon Law Review.
Philos. Rev. = Philosophical Review.
Pol. Sc. Q. = Political Science Quarterly.
Renaissance = Renaissance. Revue trimestrielle publiée par l' École Libre des Hautes Études, New York.
Rev. Ét. Gr. = Revue des Études Grecques.
Res Jud. = Res Judicatae (Melbourne).
Sc. Soc. = Science and Society.
Scot. L. Rev. = Scottish Law Review.
Seminar = Seminar. An Annual Extraordinary Number of the Jurist.
So. Afr. L. J. = South African Law Journal.
Speculum = Speculum. A Journal of Mediaeval Studies.
Thought = Thought. Fordham University Quarterly.
Traditio = Traditio. Studies in Ancient and Medieval History, Thought and Religion.
Trans. Amer. Philol. Assoc. = Transactions and Proceedings of the American Philological Association.
Tul. L. Rev. = Tulane Law Review.
Tydsk. Hed. Rom.-Holl. Reg = Tydskrif vir Hedendaagse Romeins-Hollandse Reg.
U. Chicago L. Rev. = University of Chicago Law Review.

U. Toronto L. J. = University of Toronto Law Journal.
Va. L. Rev. = Virginia Law Review.
Wis. L. Rev. = Wisconsin Law Review.
Yale Cl. St. = Yale Classical Studies.
Yale L. J. = Yale Law Journal.

Summary: I. Rome.—II. Greece.—III. Greco-Roman Egypt.—A. General legal treatises.—B. Sources, legal science, and philosophy of law.—C. Private law.—D. Criminal law.—E. Procedure.—F. Public law and Institutions (Constitutional and administrative law, finances, army, international relations).—G. Provincial administration.—H. Selected titles in history, economics, social and religious problems.—I. The influence of Roman law upon other legal systems.—J. Miscellany.

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Fontes Iuris Romani Antejustiniani. Pars tertia: Negotia. Edidit Vincentius Arangio-Ruiz. Florentiae apud S.A.G.Barbera, 1943. Pp. xxvi + 594.

Parerga. Note papirologiche ed epigrafiche. By Vincenzo Arangio-Ruiz. Napol: Casa editrice Dott. Eugenio Jovene, 1945. Pp. vii + 101.

Neither the space nor the time available to me is sufficient to do full justice to these books. However, they are so important that this periodical cannot fail to bring them to the attention of the American public interested in legal history.

The *Fontes Iuris Romani Antejustiniani* consist of three parts or volumes. The *pars prima*, edited by Salvatore Riccobono, the venerable master of Romanists anywhere, includes the *Leges*, the *pars altera*, under the care of Giovanni Baviera, presents the *Auctores*. These two *partes* were first published in 1909 and, in a revised form, again in 1940-41 by the same authors. Only the Liber Syro-Romanus in volume II, once edited by the late Contardo Ferrini, was now edited by J. Furlani, and Riccobono took advantage of the assistance especially of Adolf Berger and Vincenzo Arangio-Ruiz, at the same time entrusting the latter with the task of any further edition of volume I. These re-editions are most welcome, and the first volume in particular constitutes a brillant achievement.

The *pars tertia*, however, is a completely new work. Different from the German *Fontes iuris Romani antiqui* by Bruns (Mommsen and Gradenwitz) and the French *Textes de Droit Romain* by Girard (and Senn), the first edition of the Italian *Fontes* lacked a collection of legal transactions such as have come down to us through inscriptions, papyri and wax tablets. This imperfection could not very well be allowed to continue. Due primarily to the enormous yield of papyri in the last half century, the number and variety of transactions has increased to an incomparably greater extent than any other branch of ancient legal sources. Documents can no longer be neglected in research as second-rate material. But they were scattered in countless books and articles. A handy sylloge of well-chosen samples became a requirement of the first order. And yet there was none to satisfy the need in an adequate way. The chrestomathies of L. Mitteis and P. M. Meyer, excellent as they are, were in the first place designed to elucidate the Greco-Roman law of

Egypt and not Roman law proper. And the books of Bruns and Girard (though last revised in 1909 and 1936 respectively) were, despite additions and corrections, in substance products of the nineteenth century and thus originating in an age which had experienced but the first beginnings of the growing role of documents.

Under these circumstances a new attempt was definitely called for. To meet the challenge the author was selected. No better choice could have been made, in Italy or anywhere else. It is not enough to say that Arangio-Ruiz as a legal historian ranks with the finest among the living. He is eminently qualified for this specific assignment as a scholar equally productive in Greek, Hellenistic and Roman laws, equally versed in large-scale syntheses and in details of Greco-Roman diplomatics. Moreover, he possesses the nowadays rather rare ability to handle inscriptions as he recently demonstrated anew in his " Epigrafia giuridica greca e romana 1933-1938 " (*Studia et Documenta Historiae et Juris* 1936, 429-520 and 1939, 521-633). In any event, the result of his five year effort is a perfectly original book which leaves its predecessors behind not only in modernity and quantity of the assembled documents but also in the general method of dealing with them.

The arrangement is, as commonly, by subjects. 31 transactions relate to *jura personarum,* 15 to *collegia,* 24 deal with *testamenta et hereditates,* 16 with *res sacrae publicae religiosae,* 19 with *dominium et possessio,* 14 with *jura in rebus alienis,* 12 with *pecunia certa,* 30 with *obligationes consensu contractae,* and 28 with *res judiciariae.* Transactions written in Greek are provided with a Latin translation.

It goes without saying that the author draws heavily upon Bruns and Mommsen and many other scholars who have made contributions for the elucidation of this or that text. A wealth of references bear witness to it. But he never adopts a proposition without closest scrutiny and, where advisable and possible, proceeds to a fresh examination of the original. This critical approach leads him to numerous new readings and fillings of *lacunae,* to new suggestions and conclusions. The introduction and footnotes that accompany any number inform the reader in an admirably concise manner about the importance the author attaches to the document, about his interpretation and his reasons for the dissent, if any, from other analysis. In no previous collection of Roman transactions has a

combination of re-edition and commentary been undertaken on such a large scale.

There are ten cases in which the author felt the need of giving a fuller account of his point of view than could be offered within the sylloge. For this purpose he published a number of separate notes, most of them in the *Atti dell' Accademia di scienze morali e politiche di Napoli.* For better convenience they are now assembled in the *Parerga,* where a brief but rich preface transmits both sombre and delightful impressions. These discussions are conducted with that care and penetration for which the author is known. Painstaking revisions of the texts and accurate analyses of their formal elements shed new light on documents so often examined as the *donatio Statiae Irenes* (56 ff; *Negotia* no. 95) and the *mancipatio fiduciae causa* of Poppea Note (67 ff; *Neg.* no. 91). P. Michigan inv. 4703 (= *Neg.* no. 20) is shown to be the beginning of an agreement concerning the restitution of a *dos* (24ff.). P. Hamb. 70 (= *Neg.* no. 29) furnishes the occasion for a circumspect discussion of *legata per vindicationem* of *fundi provinciales* and the *auctoritatis interpositio* in the case of several *tutores testamentarii* (39ff.). The treatment of P. Columbia inv. 181-182 (= *Neg.* no. 101) seems a model of ingenious interpretation (79ff.). The papyrus gives only an incomplete abstract of that *Lex Constantiniana* to which CJ 7.39.2 (365) refers. To get a fuller account of the original rescript, elements from both versions have to be combined. Constantine, then, conceived the *longissimi temporis praescriptio* not only as a means of defense but as a mode of acquiring ownership, provided that the parties in possession for more than forty years *sibi potius quam alteri possederunt.*

These illustrations may suffice. The *Negotia* will prove to be indispensable for any conscientious worker in the field. We hope with the author that he will live to prepare a second edition which at the same time may enable him to give an even more prominent account of the " dark " and yet so important centuries between the termination of the classical era and the compilation of Justinian.

Ernst Levy

University of Washington
Seattle

Breviarium Iuris Romani. By Vincenzo Arangio-Ruiz and Antonio Guarino. Milano, Dott. A. Giuffrè, Editore, 1943. Pp. viii + 641.

This collection of selected Roman legal sources is compiled, in the words of the editors, for the use of the great public of non-Romanists: students, practitioners, and theorists of actual law, philologists, and—last not least—" uomini di coltura ". Owing to the collaboration of an outstanding legal historian (cf. also the preceding review) and a representative of the younger generation who has distinguished himself during the last few years by his vast literary activity, the compilation shows that particular note which only the long experience of a mature educator, combined with the enthusiasm and zeal of a younger, well prepared adept may produce.

This is not the first collection of fundamental texts of Roman Law, but it was a new and fortunate idea of including in it the full text of both Gaius' and Justinian's Institutes. Everybody who is familiar with these two elementary presentations of Roman Law, so closely related to each other and yet so different, will certainly agree with the editors that the juxtaposition of the two gives the reader a " linear, perspicuous " picture of the Roman Law in its two most characteristic shapes: the classical and the Justinian one. This picture is completed by an appropriate selection of texts from other sources, especially from Justinian's Digest and Code, all in all about 800 fragments. The choice of these additional texts has been made independently of other collections of the kind. It achieves in a remarkable manner the editors' aim of supplementing the presentations given in the two works of Institutes. Many a reader will perhaps miss the unique Roman definition of *ius* from Celsus' pen, *ius est ars boni et aequi,* in the opening text of the Digest (on this sentence see now the impressive pages by S. Riccobono, *Quaderni di Roma,* I [1947] 32-42) ; or that of *praecepta iuris* in Dig. 1.1.10.2. Should not just in our time the world be reminded of the famous Roman precepts: *honeste vivere, alterum non laedere, suum cuique tribuere?*

A glance into the analytic Index (pp. 617-641) gives the best evidence of how much the booklet offers to the reader. This alphabetical and analytical guide through both Gaius' and Justinian's Institutes is, if I am correct, the first of its kind. It is extremely useful and

makes it very easy to trace the passages referring to a given topic in both of them. Still, it might have been preferable to refer to the individual passages according to their traditional numeration, rather than to the pages of the collection. The few extra-pages of print which this method of citation would have required should not count in view of the advantage for the reader, who thus would more promptly find the texts wanted without being obliged to run down entire pages for one technical term listed in the Index. For instance one will look in vain for *scriptura* on pp. 69 and 252; and on the seven pages noted under *accessio* (69 s., 248 s., 250 ss.) one will find the word only twice: p. 250 in Inst. Just. 2.1.26, and at the bottom of p. 252 in 2.1.34. As far as the third part of the collection, the *Florilegium iurium et legum* is concerned, the texts are to be found much easier, but even there, a numeration of the excerpts by consecutive numbers, as for example used by Kübler in his *Lesebuch,* would have simplified the citations in the Index.

The three parts of the compilation are preceded by individual Introductions which, although very concise, are very rich in content. They give on a few pages an instructive and colorful picture of Gaius and his work (pp. 3-9), Justinian's Institutes (pp. 197-203), and the rest of Justinian's codification (pp. 427-439). The advanced student will find some interesting, original remarks in these introductory chapters, as well as in many a foot-note. (The paper announced by Arangio-Ruiz, p. 201 n. 2, appeared in the meantime in *Scritti di diritto romano in onore di C. Ferrini, pubblicati dall'Università di Pavia* [1946] pp. 81-117). It must be said to the credit of the editors that they did not oversimplify their task.

This notice would be incomplete if particular mention were not made of the external qualities of the booklet: its clear, pleasant and carefully proof-read print, and the handy pocket size; and finally the use of a very thin paper, which made it possible that the substantial volume with its 650 pages scarcely exceeds half an inch in thickness.

Among all similar publications preference should be given to the *Breviarium* without any hesitation.

Adolf Berger

École Libre des Hautes Études
New York

The Institutes of Gaius. Part I: Text with Critical Notes and Translation. By Francis de Zulueta, D.C.L., F.B.A. Oxford: At the Clarendon Press, 1946. Pp. viii + 305.

Professor de Zulueta's new edition of Gaius will be heartily welcomed by students and scholars alike. It provides, side by side, a thoroughly readable Latin text, which keeps abreast of modern Gaian scholarship, and a lucid, straightforward rendering in English, the need for which hardly requires justification: for the earlier translations of Muirhead (1895) and Poste (4th ed. 1925) could not be simply patched up with emendations and additions, to satisfy the demand for an English version that is in keeping with the improvements of the original text as afforded by more recent critical and papyrological research.

The edition follows Krüger's example in marking by italics all deviations from Studemund's *Apographum* (with its supplements) of the Verona palimpsest, but to a far greater extent than Krüger (6th ed. 1912, 7th ed. 1923) de Zulueta incorporates conjectural readings in the text itself rather than relegating them to the apparatus. The emendations adopted represent a well-reasoned choice—*omnia probate, quod bonum est tenete*—of the readings suggested, in addition to Krüger, by modern editors and critics; Kübler (8th ed. 1939) is frequently, but by no means always, followed. A judicious selection of further conjectures is reported in the apparatus, passing over in silence, however, the objectionable text of Bizoukides' edition (1937ff.). Also, while obvious glosses that got into the text are duly indicated, the reader wisely is spared a full information on all the attacks which the more radical school of interpolationist critique has leveled against countless Gaian passages. It has been recently pointed out in F. Schulz's brilliant *History of Roman Legal Science* (Oxford 1946, p. 162) how far removed a procedure which takes every and any sentence under the microscope, instead of applying critical analysis to the Institutes as a whole, is from a proper evaluation of the Gaius text. "The present edition," says de Zulueta (p. iii), "would not be undertaken by anyone holding that view [of a large-scale corruption of the Veronese text by post-Gaian matter]." On the other hand, the editor has found it advisable to furnish a full critical apparatus where he incorporates the Oxyrhynchus and Arsinoite fragments, to which, it is known, he repeatedly applied himself before (cf. *Law Quarterly Rev.* 44[1928]

198ff.; *Journal of Roman Studies* 24 [1934] 168ff.; 25, 21ff.; 26, 174ff.).

The second set of footnotes, containing references to parallel texts, is equally designed to satisfy the needs of the student in preference to those of the specialist. Consequently, the notes concentrate chiefly, but not exclusively, on internal cross-references and references to Justinian's Institutes.

What de Zulueta gives us in this volume is a highly practicable yet scientifically impeccable text of the work which remains unsurpassed as an introduction to Roman law. As to the English version, only the purist will find fault with the principle employed by the author, who preferred to retain in Latin technical legal terms which have only approximate but no precise equivalents in English (e.g., at the first appearance of *connubium,* the English " power to contract civil marriage " is given in parenthesis, but subsequently *connubium* is kept). The reviewer believes that the didactic precision attained by this method outweighs by far any " lack of elegance " and serves far better the purpose than any translation with different, literary ambitions.

The splendid achievement of the volume under review makes us expect with eagerness the eminent author's Commentary on Gaius, which is to follow soon as Part II.

Stephan Kuttner

The Catholic University of America

L. L. Hammerich, *Clamor: Eine rechtsgeschichtliche Studie.* (Det Kgl. Danske Videnskabernes Selskab: Historisk-filologiske Meddelelser, Bind XXIX, Nr. 1). Kobenhavn, Hos Ejnar Munksgaard, 1941. Pp. 207, 8°.

Historians of law will note with pleasure that the history of German legal thought and institutions, in the pre-war period so well represented by such classical figures of international renown as Brunner, Gierke, Amira, Stutz, finds its tradition continued in Sweden and Denmark. While the *Niederdeutsche Mitteilungen,* a new scholarly journal appearing in Lund and chiefly devoted to Low German philology, includes studies in legal history, the Danish Academy of Sciences published *Clamor: Eine rechtsgeschichtliche Studie,* in which philology is happily employed in the service of an

inquiry into the genesis and significance of the ancient institutions of *clamor* and *gerüfte*.

Originally *clamor* was doubtless no more than an alarm and cry for help when a crime was committed and the malefactor caught red-handed. There was a general obligation to come to the aid of the attacked and to pursue the perpetrator when such neighborhood hue was raised. This fact emerges clearly from Indian as well as Greek and Roman law sources and the legal terminology applied therein. It was only at the summit of the Middle Ages that the alarm and cry for help became first a normal and later an essential part of criminal procedure. The injured individual, who was privileged to wreak instant vengeance upon a real wrongdoer, achieved through it the publicity necessary to free his act of revenge from the taint of aggression or criminal action. By his hue-raising his reaction to a crime which had been inflicted on him was openly proved to be lawful reprisal. In bringing his case before the competent court of law, the prosecuting accuser had solemnly to continue or repeat his alarm cry in the presence of the judge and his assessors. It is clear that through the formalization of the procedure its original character was changed: it had become the opening act in the prosecution and an important element of the evidence as required by law. This development can be especially observed in twelfth- and thirteenth-century Saxony and Thuringia. The *Gerüfte*, as it was called there, played an important role in medieval criminal procedure, which minutely elaborated on all legal requirements connected with this institution.

Heinrich Brunner thought of this procedure as a legal action directed against an outlaw or peaceless man.[1] Franz Beyerle, on the other hand, related the handhaving procedure to revenge rather than outlawry, his most convincing argument being the fact that only the injured party could exercise revenge, while an outlaw could be killed by anyone.[2] If the red-handed offender escaped from the spot where he had committed the crime, his victim was allowed to pursue him if he had called upon his neighbors for help; he could capture and bind the malefactor and present him to a court, where the

[1] H. Brunner, *Deutsche Rechtsgeschichte*, II (2nd ed., Munich-Leipzig, 1928), 628f.

[2] Franz Beyerle, *Das Entwicklungsproblem im germanischen Rechtsgang* (Deutschrechtliche Beiträge, Vol. X, Heft 2; Heidelberg, 1915), p. 265ff.

criminal was not allowed to speak in his defense. Beyerle's concept of the legal evolution has for long been generally accepted.[3] The author of *Clamor* also agrees with this opinion, although he does not refer to Beyerle. He turns, however, against Wilhelm Schulze, the erudite philologist who searched for instances of *Gerüfte* in several of the ancient Indo-European legal systems and reached the conclusion that the custom of *Gerüfte* "surely can be considered as *gemeingermanisch.*"[4]

Philological and legal-historical inquiries into Indian, Greek, Roman, Celtic, East- and West-Germanic, English, Norman, Nordic, Frisian, Dutch, Swiss and German law led the author to the following assumptions: *Gerüfte* as a proof of a handhaving crime or as an act of self-help opening up the legal procedure cannot be regarded as a general legal institution of common-Germanic origin. It is not found in most of the examined territories in its specific application. Simple alarm in different ancient forms was, of course, well-known. But *Gerüfte* in its technical form as the incipient stage of the trial and as an important part of the evidence developed in Saxony-Thuringia only during the twelfth and thirteenth centuries. Wherever else traces of this procedure are found in the sources outside of those territories, direct or indirect influence of Saxon-Thuringian law must be supposed. In some instances, however, such influence seems even to the author somewhat vague or improbable (pp. 79, 149).

Doubtlessly, the utmost caution is imperative in declaring any historical institution of law as *gemeingermanisch.* In this respect the author has certainly provided ample proof for the soundness of his first thesis, although this reviewer does not feel competent to enter into an examination or discussion of the philological problems involved. The evidence adduced for the remaining hypotheses, however, does not seem conclusive or cogent to him.

According to *Sachsenspiegel,* Landrecht, I, 62, 1 "daz gerûchte is der clage begin," which means that *Gerüfte* constituted, indeed, the most important initial act of the legal procedure. This seems to

[3] Cf. Julius Goebel, *Felony and Misdemeanor: A Study in the History of English Criminal Procedure* (New York, 1937), pp. 66, 85, 360f.

[4] Wilhelm Schulze, "Beiträge zur Wort- und Sittengeschichte," *Sitzungsberichte der Königlich Preussischen Akademie der Wissenschaften,* XXVI (1918), 481-511; especially 487.

have been the case even in the pre-*Sachsenspiegel* law. If no court was available in the place where the unlawful act had been committed, it was inevitable to interrupt the *Gerüfte* and later to resume or repeat it before the competent court. In this crucial point the author's legal-historical interpretation differs from that of the reviewer. The former maintains:

> "Wenn der alarmruf seine eigentliche sphäre verlässt und in den prozess aufgenommen wird, sodass z.b. der kläger bei seiner klage vor dem gericht den bei der beklagten tat erhobenen alarmruf wiederholen muss, dann ist das eigentliche gerüft entstanden; es ist klar, dass der in solcher weise wiederholte alarmruf nicht dieselbe wirkung hat wie der eigentliche alarmruf" (p. 190 f.).

There is not only no sufficient support from the sources for this assertion, but the interpretation of adduced law cases is apparently arbitrary, at least at times. This applies, for instance, to the case related in the *Brünner Schöffenbuch*, ed. E. F. Rössler, Art. 401 (p. 139f.). It is contrary to the text to assume that "das *waffengeschrei* offenbar eine praktische, aber keine juristische bedeutung hat." For the source first states that those attacked "clamorem terrificum, qui *waffengeschrai* dicitur flebiliter protulerunt" and, after reporting the malefactor's capture, continues that "hospes de ipsis, *sicut prescribitur* querulans . . ." indicating that the logical continuation of *Gerüfte* was its repetition in, or bringing suit before, the court. The genesis of the "eigentliche Gerüfte", therefore, cannot be sought in the repetition of the alarm cry before the court, while the *Waffengeschrei* would not be considered as *Gerüfte* and the initiation of the legal procedure. Space does not permit examination and explanation of other examples (cf. p. 164f.). Many more pertinent cases, most interestingly reported in medieval law sources and important for the historical development of *Gerüfte*, escaped the author's attention.[5] So did important pre-war publications on the subject.[6]

All told, the problems discussed in this diligent work still await

[5] E.g., Guido Kisch, *Leipziger Schöffenspruchsammlung* (Quellen zur Geschichte der Rezeption, Vol. I; Leipzig, 1919), Index, s.v. *Gerüfte;* see also the following note.

[6] Erich Holdefleiss, *Der Augenscheinsbeweis im mittelalterlichen deutschen Strafverfahren* (Deutschrechtliche Forschungen, ed. by G. Kisch, Heft 6; Stuttgart, 1933), p. 17ff.

further clarification and final solution. There can be no doubt, however, that the author has made an important and appreciable contribution to the discussion through his thought-provoking work (cf. *Erasmus*, I[1947], 559ff.).

GUIDO KISCH

NEW YORK CITY

INTENSIFIED PROGRAM OF ROMAN LAW STUDIES IN BRAZIL

Professor Gaetano Sciascia, for many years an assistant to Professor Salvatore Riccobono in Rome, has been invited by the Catholic University of Sao Paulo to give a series of lectures on Roman Law. After taking up his new position in Brazil in January, 1947, Dr. Sciascia soon began organizing a *Seminar of Roman Law*, in which students, professors, and other scholars alike are participating, and which is largely operating on the lines of the Riccobono Seminar of Roman Law in America at Washington. The publication in this volume of Dr. Sciascia's article on the Roman military testament is intended to mark a beginning of what the editors hope will develop into a lasting and intense cooperation in the common interest of legal historical studies.

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

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